INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question	1
Statutory provisions believed to sustain the jurisdiction	2
The statute of the Commonwealth of Pennsylvania, the validity of which is involved	2
Date of the judgment sought to be reviewed and of application for appeal	4
Statement showing that the nature of the case and rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon	4
The stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the Court; the rulings of the Court therein to show that the case is brought within the statutory provision believed to confer jurisdiction on this Court	8
Statement of the grounds upon which it is contended that the questions involved are substantial	14
The nature of the tax and the taxation of property beyond the taxing jurisdiction	14
Is the method of allocation provided in the Act of 1935 inherently arbitrary and unreasonable	17
Even if the tax imposed by the Act of 1935 is a franchise tax, does the method of allocation used result in imposing tax upon, or measuring the tax by, property of appellant located and employed outside of Pennsylvania	20

Page

The case of *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331 22
Do the Act of 1935 and the tax imposed on appellant thereunder deny to it the equal protection of the laws 24
Do the Act of 1935 and the tax imposed on appellant thereunder impair the obligation of the contract between appellant and the Commonwealth 25
Does the Act of 1935 as construed and applied in imposing tax on appellant unduly and unlawfully burden interstate commerce 27
Opinions 30
Conclusion 30
Appendix "A"—Act of May 16, 1935 of the Pennsylvania Legislature 31
Appendix "B"—Opinion of the Supreme Court of Pennsylvania 39
Appendix "C"—Opinion of the Supreme Court in *Ford Motor Co.* v. *Commonwealth* 47
Appendix "D"—Opinion of the Supreme Court of Pennsylvania in the case of *Commonwealth of Pennsylvania* v. *Columbia Gas and Electric Corporation* ... 61

Table of Cases Cited

Alpha Portland Cement Co. v. *Mass.*, 268 U. S. 203 20
American Smelting & Refining Co. v. *Colorado*, 204 U. S. 103 26,27
Arrott's Estate, 322 Pa. 367, 185 Atl. 697 16
Atlantic Lumber Co. v. *Commissioner*, 298 U. S. 553 20
Atlantic Refining Co. v. *Virginia*, 302 U. S. 22 23
Bank Tax Case, 2 Wall. 200 15
Bank of Commerce v. *New York City* 2 Black. 620 15
Butler Bros. v. *McColgan*, 315 U. S. 501 19
Commonwealth v. *Columbia Gas & Electric Corp.*, 336 Pa. 209, 8 A. (2d) 404 16,20
Commonwealth v. *Standard Oil Co.* 101 Pa. 119 15
Commonwealth v. *Union Trust Co. of Pittsburgh*, 345 Pa. 298 16

Page

Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77 22
Cudahy Packing Co. v. *Minnesota*, 246 U. S. 450 29
Delaware, Lackawanna & Western R. R. Co. v. *Pennsylvania*, 198 U. S. 341 15,22
Educational Films Corp. v. *Ward*, 282 U. S. 379 71
Fargo v. *Hart*, 193 U. S. 490 21,22
Ford Motor Co. v. *Beauchamp*, 308 U. S. 331 16,17,29
Ford Motor Co. v. *Commonwealth of Pennsylvania*, 350 Pa. 236, 38 A. (2d) 329 30
Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494 .. 25
Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S 290 .. 29
International Shoe Co. v. *Shartel*, 279 U. S. 429 16,17
James v. *Dravo Contracting Co.*, 302 U. S. 134 22
Kansas City, etc., & R. R. Co. v. *Stiles*, 242 U. S. 111 .. 24
Macallen Co. v. *Mass.*, 279 U. S. 620 17
Maine v. *Grand Trunk Rwy. Co.*, 142 U. S. 217 29
Matson Navigation Co. v. *State Board*, 297 U. S. 441 ... 29
National Leather Co. v. *Mass.*, 277 U. S. 413 22
People ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N. Y. 48, 129 N. E. 202, 256 U. S. 702 19
Pullman Co. v. *Richardson*, 261 U. S. 330 29
Roberts & Schaefer Co. v. *Emmerson*, 271 U. S. 50 17
Schuylkill Trust Co. v. *Pennsylvania*, 296 U. S. 113 17
Society for Savings v. *Coite*, 6 Wall. 594 15
Southern Railway Co. v. *Greene*, 216 U. S. 400 25
Southern Realty Co. v. *McCallum*, 65 Fed.(2d) 934, 290 U. S. 692 22
Standard Oil Co. of California v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611 2
U. S. Glue Co. v. *Town of Oak Creek*, 247 U. S. 321 29
Wallace v. *Hines*, 253 U. S. 66 22
Western Live Stock Co. v. *Bureau*, 303 U. S. 250 29

STATUTES CITED

Act of June 1, 1889 of the Pennsylvania Legislature, Section 20, P. L. 420, as amended by the Act of April 25, 1929, P. L. 657 3

Page

Act of May 28, 1907 of the Pennsylvania Legislature, P. L. 226 25,26
Act of May 16, 1935 of the Pennsylvania Legislature, P. L. 184 (72 Purdon's Statutes, sections 1901–1902, 1871, 1891, 1892a–1892d) 2,3,5,14
Business Corporation Law of Pennsylvania of May 5, 1933, P. L. 364, 15 Purdon's Statutes, section 2852 .. 5,26
Constitution of the United States:
Article I, Section 8 7
Article I, Section 10 6
14th Amendment 6
Judicial Code, Section 237(a), as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 937, 28 U.S.C.A. 344a, and as modified by the Act of January 31, 1928, c. 14, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466, 28 U.S.C.A. 861a and b. 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 873

THE QUAKER OATS COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, The Quaker Oats Company, appellant, herewith submits its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

I

Basis Upon Which It Is Contended that the Supreme Court of the United States Has Jurisdiction Upon Appeal to Review the Judgment in Question.

The judgment of the Supreme Court of Pennsylvania, a review of which is sought by this appeal, was dated and filed

on June 30, 1944, and made final on September 25, 1944, by the refusal by said Court of a Petition for Reargument, seasonably filed. It is a final judgment in a suit in the highest court of the State of Pennsylvania in which a decision in the suit could be had. In this suit, there was drawn in question the validity of a statute of the Commonwealth of Pennsylvania on the ground of its being repugnant to the Constitution of the United States. A decision on this question was necessary to the determination of the case, and the decision was in favor of its validity. Accordingly the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question. *Standard Oil Company of California* v. *Johnson,* 316 U. S. 481, 483, 86 L. Ed. 1611.

II

Statutory Provision Believed to Sustain the Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment in question is Section 237 (a) of the Judicial Code of the United States, as last amended by the Act of February 13, 1925, C. 229, section 1, 43 Stat. 937, 28 U. S. C. A. 344 (a); and as modified by the Act of January 31, 1928, C. 14, 45 Stat. 54, as amended April 26, 1928, C. 440, 45 Stat. 466, 28 U. S. C. A. 861a-861b.

III

The Statute of the Commonwealth of Pennsylvania, the Validity of Which Is Involved

The statute of the Commonwealth of Pennsylvania which was held to be valid but which appellant contended was repugnant to the Constitution of the United States, is the Act of May 16, 1935, P. L. 184, (72 Purdon's Statutes, sections 1901-1902, 1871, 1891, 1892a-1892d), which amended Sec-

tions 20 and 21 of the Act of June 1, 1889, P. L. 420; and particularly Section 21 (b) thereof (72 Purdon's Statutes, sections 1871, 1891, 1892a-1892d). See Appendix for verbatim provisions of this Act.

Prior to the year 1935 both domestic corporations incorporated in Pennsylvania, and foreign corporations doing business in Pennsylvania, were subject to a tax upon the actual value of their whole capital stock, valued and appraised in the manner set forth in Section 20 of the Act of June 1, 1889, P. L. 420, as amended by the Act of April 25, 1929, P. L. 657.

The Act of May 16, 1935, P. L. 184, which amended Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, (72 Purdon's Statutes, sections 1901-1902, 1871, 1891, 1892a-1892d), the validity of which is in question in this case, provided for the taxation of domestic and foreign corporations on different bases. Domestic corporations remained subject to the tax on capital stock, as they had been prior to 1935; but foreign corporations were subjected to a so-called franchise tax, imposed in lieu of the tax on capital stock which had been imposed upon such corporations prior thereto.

Section 21 (b) of the Act of 1935 provided, with respect to foreign corporations, that

> "The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this Act, and shall be divided into three equal parts."

Under the twentieth section of said Act, the valuation and appraisal of the capital stock of domestic and foreign corporations was made in the same manner. Section 21 (b) of said Act then provided that the taxable portion of the capital stock of a foreign corporation should be computed by the application of a formula made up of three fractions

consisting of tangible property, payroll and receipts, the elements of which are elaborately set forth in the Act.

IV

Date of Judgment Sought to Be Reviewed and of Application for Appeal

The judgment of the Supreme Court of Pennsylvania sought to be reviewed was dated and filed on June 30, 1944.

On July 6, 1944, the appellant presented to said Court a petition to hold the record in the Supreme Court until August 1, 1944, which petition was duly granted July 10, 1944.

A petition for reargument was filed by the appellant in the Supreme Court of Pennsylvania on July 31, 1944, which petition was duly entertained and was refused on September 25, 1944. On the same date, an order was made by said Court to the Prothonotary to hold the record for ninety days to permit the prosecution of this appeal.

The application for appeal was presented on December 20, 1944.

V

Statement Showing That the Nature of the Case and the Rulings of the Court Were Such as to Bring the Case Within the Jurisdictional Provisions Relied Upon.

The Quaker Oats Company, the appellant, was incorporated under the laws of New Jersey to manufacture and deal in cereals and cereal products, where it had its legal domicile. During the year 1935, it had its principal office and place of business at Chicago, Illinois, which was its business or commercial domicile.

It was duly registered and doing business, as a foreign corporation, in Pennsylvania, prior to the enactment of

the Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes, section 2852. On August 24, 1933, as required under the provisions of said Business Corporation Law, it applied for and received from the Commonwealth of Pennsylvania a Certificate of Authority authorizing it to transact as a foreign corporation in Pennsylvania the business of "selling and dealing in cereals and cereal products."

The appellant as required by the Act of May 16, 1935, P. L. 184, which amended Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, (72 Purdon's Statutes, sections 1901-1902, 1871, 1891, 1892a-1892d), duly filed with the Department of Revenue of the Commonwealth of Pennsylvania a report for the year 1935, on the basis of which the taxing officers of the Commonwealth made their settlement in which they imposed upon the appellant a tax in the amount of $4,665.66, which amount was subsequently increased by the said taxing officers to $28,645.69. Appellant obtained a review and the tax was resettled at $16,-495.38.

The appellant thereupon filed an appeal in the Court of Common Pleas of Dauphin County, Pennsylvania, in which it contended inter alia, that the resettlement of tax, and the Act of May 16, 1935, P. L. 184, under the authority of which said resettlement had been made, were repugnant to the Constitution of the United States, because:

1. The tax which was imposed was in fact a tax on property, and the statute authorized its assessment in the said resettlement upon property of the appellant which had its situs for taxation outside of the Commonwealth of Pennsylvania, and beyond its taxing jurisdiction.

2. Even if the tax were determined to be a tax upon the franchise or privilege of doing business in Pennsylvania, nevertheless the method of allocation or apportionment of

that part of the capital stock of appellant to be taxed by the Commonwealth of Pennsylvania was arbitrary, unreasonable and capricious; did not bear any just or reasonable relation to the value of the property of appellant which was employed in Pennsylvania or which had its situs for taxation therein; and resulted in imposing a tax upon property of the appellant which was employed or which had its situs outside of the Commonwealth and beyond its jurisdiction—all of which denied to appellant the due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The provisions of the said Act under which foreign corporations are classified and taxed separately on the basis of difference in domicile only (R. 192a), deny to foreign corporations the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States because the exemptions that are allowed to domestic corporations for capital stock tax purposes are not allowed to foreign corporations of the same kind.

4. The said resettlement of tax made against appellant denies to it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States because therein exemption is not allowed to it for investments in United States securities and shares of subsidiary corporations more than 50% owned, which are allowed to domestic corporations of the same kind for capital stock tax purposes.

5. The provisions of said Act and the resettlement of tax made thereunder against appellant impair the obligation of the contract between appellant and the Commonwealth of Pennsylvania in violation of Article I, Section 10 of the Constitution of the United States because no pro-

vision is made in said Act for the allowance of an exemption to appellant, and no exemption is allowed in said resettlement to appellant, for its investments in United States securities and shares of subsidiary corporations more than 50% owned, which are allowed to domestic corporations of the same kind for capital stock tax purposes.

6. As applied to the appellant, the provisions of said Act and the resettlement of tax made thereunder against appellant, unduly and unlawfully burden and regulate interstate commerce in violation of Article I, Section 8, of the Constitution of the United States where the total receipts from certain interstate transactions were included in the numerator of the gross receipts allocation fraction.

The trial court, after making minor modifications in the three statutory allocation fractions and in the valuation of appellant's capital stock value, determined the amount of tax owing by appellant to be $16,637.38; specifically overruled each of the contentions made by appellant; and upheld the validity of the said Act of May 16, 1935, P. L. 184.

On appeal to the Supreme Court of Pennsylvania from the findings, conclusions, rulings and judgment of the trial court, appellant made the same contentions as before the trial court. In affirming the judgment of the trial court, the Supreme Court of Pennsylvania overruled specifically each contention made by appellant and upheld the validity of the said Act of May 16, 1935, P. L. 184.

VI

The Stage in the Proceedings in the Court of First Instance and in the Appellate Court, at Which, and the Manner in Which, the Federal Questions Sought to Be Reviewed Were Raised, the Method of Raising Them, and the Way in Which They Were Passed Upon by the Court; the Rulings of the Court Thereon to Show That the Case Is Brought Within the Statutory Provision Believed to Confer Jurisdiction on This Court.

The first question as stated above was raised by appellant in the 8th, 9th, 15th and 16th paragraphs of its Appeal and Specifications of Objections filed with the trial court, (R. 4a, 5a, 9a and 10a) and more fully stated in appellant's 1st, 3rd and 4th Requests to the trial court for Conclusions of Law (R. 189a, 190a), which read as follows:

> "1. The tax imposed upon a foreign corporation by the provisions of Section 21, paragraph (b), of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, is a tax upon so much of the capital stock of such corporation as is allocated to the Commonwealth of Pennsylvania by the method prescribed therein, and as such it is a tax upon the assets and property of the corporation and not upon any franchise or privilege, or the exercise thereof."

> "3. The provisions of Section 21, paragraph (b), of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, are unconstitutional and void because they violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that they deprive the defendant of its property without due process of law by imposing a tax upon property of the defendant which has its situs outside the Commonwealth of Pennsylvania and beyond its taxing jurisdiction."

"4. The settlement of tax appealed from is unconstitutional and void because it violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the defendant of its property without due process of law by imposing a tax upon property of the defendant which has its situs outside the Commonwealth of Pennsylvania and beyond its taxing jurisdiction."

The second question as stated above was raised by appellant in the 12th and 14th paragraphs of its Appeal and Specifications of Objection filed with the trial court (R. 7a, 8a, 9a) and more fully stated in appellant's 9th and 10th Requests to the trial court for Conclusions of Law (R. 191a, 192a), which read as follows:

"9. The provisions of Section 21, paragraph (b), of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, are unconstitutional and void because they violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law, in that the method prescribed therein for assigning or allocating to the Commonwealth of Pennsylvania that portion of the capital stock of the defendant which is subject to taxation by the Commonwealth of Pennsylvania, is arbitrary, unreasonable and capricious, does not bear any just or reasonable relation to the value of the property of the defendant which has its situs for taxation within the Commonwealth of Pennsylvania, and results in imposing a tax upon property of the defendant which has its situs outside of the Commonwealth and beyond its taxing jurisdiction."

"10. The settlement of tax appealed from is unconstitutional and void because it violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law, in that

the method therein applied in assigning or allocating to the Commonwealth of Pennsylvania that portion of the capital stock of the defendant which is subject to taxation by the Commonwealth of Pennsylvania, is arbitrary, unreasonable and capricious, does not bear any just or reasonable relation to the value of the property of the defendant which has its situs for taxation within the Commonwealth of Pennsylvania, and does, in fact, impose a tax upon property of the defendant which has its situs outside of the Commonwealth and beyond its taxing jurisdiction."

The third question as stated above was raised by appellant in the 23rd paragraph of its Appeal and Specifications of Objection filed with the trial court (R. 13a), and more fully stated in appellant's 11th, 13th and 15th Requests to the trial court for Conclusions of Law (R. 192a, 193a, 194a), which read as follows:

"11. The defendant, having been duly authorized and qualified by the laws of the Commonwealth of Pennsylvania to do business in this state, is entitled to the equal protection of its laws; and it cannot be subjected to taxation which will impose upon it burdens which are substantially different or greater than those imposed upon domestic corporations of the same class."

"13. If the provisions of Section 21, paragraph (b), of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, were to be construed as imposing a tax upon the franchise or privilege of doing business in Pennsylvania by the defendant, they would be unconstitutional and void because they would violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant of the equal protection of the laws, in that they would impose upon the defendant a tax for the franchise or privilege of doing business in Pennsylvania, while at the same time no similar tax is imposed upon domestic corporations of the same class for the franchise or privilege of doing business in Pennsylvania."

"15. The provisions of Section 21, paragraph (b), of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, are unconstitutional and void because they violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they discriminate against foreign corporations and in favor of domestic corporations by including in the taxable value of the capital stock of foreign corporations subject to tax thereunder, the value of securities of the United States, and the value of the shares of stock of other foreign corporations a majority of whose voting stock is owned by the foreign corporation taxed, and all or a part of whose property and assets have a legal situs outside of Pennsylvania, although under the provisions of the Act of June 22, 1931, P. L. 687, a domestic corporation owning a majority of the voting stock of a foreign corporation would not be subject to taxation upon so much of the value of such shares as represented property or assets located or having a legal situs outside of Pennsylvania, nor upon the value of its capital stock invested in securities of the United States."

The fourth question as stated above was raised by appellant in the 23rd paragraph of its Appeal and Specifications of Objection filed with the trial court (R. 13a), and more fully stated in Appellant's 14th and 16th Requests to the trial court for Conclusions of Law (R. 193a, 194a), which read as follows:

"14. If the tax imposed by the settlement appealed from be construed as a tax upon the franchise or privilege of doing business in Pennsylvania by the defendant, then the said settlement is unconstitutional and void because it violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, by depriving the defendant of the equal protection of the laws, in that it imposes upon the defendant a tax for the franchise or privilege of doing business in Pennsylvania although the laws of the Commonwealth of Pennsylvania do not impose any

similar tax upon domestic corporations of the same class for the franchise or privilege of doing business in Pennsylvania."

"16. The settlement of tax appealed from is unconstitutional and void because it violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it discriminates against the defendant and in favor of domestic corporations by including in the taxable value of the capital stock of the defendant the value of securities of the United States, and the value of the shares of stock of other foreign corporations a majority of whose voting stock is owned by the defendant, and all or a part of whose property and assets have a legal situs outside of the Commonwealth of Pennsylvania, although under the provisions of the Act of June 22, 1931, P. L. 687, a domestic corporation owning a majority of the voting stock of a foreign corporation is not subject to taxation upon so much of the value of such shares as represents property or assets located or having a legal situs outside of Pennsylvania, nor upon the value of its capital stock invested in securities of the United States."

The fifth question as stated above was raised by appellant in the 29th paragraph of its Appeal and Specifications of Objection filed with the trial court (R. 15a), and more fully stated in Appellant's 17th and 18th Requests to the trial court for Conclusions of Law (R. 194a, 195a), which read as follows:

"17. The provisions of Section 21(b) of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, are unconstitutional and void because they violate the provisions of Article I, Section 10, of the Constitution of the United States by impairing the obligation of the contract between the defendant and the Commonwealth of Pennsylvania, the terms of which provided that the defendant should enjoy the same rights and privileges as a domestic corporation

and should not be subject to any greater liabilities, restrictions, duties or penalties."

"18. The settlement of tax appealed from is unconstitutional and void because it violates the provisions of Article I, Section 10, of the Constitution of the United States by impairing the obligation of the contract between the defendant and the Commonwealth of Pennsylvania, the terms of which provided that the defendant should enjoy the same rights and privileges as a domestic corporation and should not be subject to any greater liabilities, restrictions, duties or penalties."

The sixth question as stated above was raised by appellant in the 26th paragraph of its Appeal and Specifications of Objection filed with the trial court (R. 14a), which reads as follows:

"26. As applied to the appellant, the Act of May 16, 1935, P. L. 184, under the supposed authority of which the settlement of tax here appealed from was made, and the said settlement of tax are unconstitutional, illegal and void, because they violate the following provisions of Article I, Section 8, of the Constitution of the United States:

"The Congress shall have Power • • •

• • • • • • •

"To regulate Commerce with foreign nations, and among the several States, • • •"

for the reason that the necessary effect of the said Act as construed and applied and of the settlement as made is to burden and regulate, unduly and unlawfully, interstate commerce, since receipts from interstate commerce transactions have been included in the numerator of the third statutory allocation fraction."

The appellant urged these questions in its exceptions to the findings of fact, conclusions of law, opinion and judg-

ment nisi of the trial court and in its assignment of errors, brief and argument in the Supreme Court of Pennsylvania. These questions were specifically overruled and the validity of the tax statute was upheld by the trial court in its opinion, in its refusal to find Conclusions of Law as requested by the appellant and in overruling appellant's exceptions to its findings of fact and conclusions of law, its opinion and judgment nisi; and by the Supreme Court of Pennsylvania in its opinion in affirming the judgment of the trial court.

VII

Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial

The constitutional questions decided by the Supreme Court of Pennsylvania are substantial and important. They have either not been passed upon by the Supreme Court of the United States or have been decided contrary to the rulings of the trial court and the Supreme Court of Pennsylvania, as will hereinafter be indicated.

(a)

The nature of the tax and the taxation of property beyond the taxing jurisdiction

The question is presented whether the tax imposed on foreign corporations by the Act of May 16, 1935, P. L. 184, which amended Sections 20 and 21 of the Act of June 1, 1889, P. L. 420 (72 Purdon's Statutes, sections 1901-1902, 1871, 1891, 1892a-1892d), is a tax on property or a tax on the franchise of doing business in Pennsylvania. If the former, then clearly the tax on appellant is imposed on its property beyond the taxing jurisdiction and is imposed upon United States securities owned by appellant because the only property employed by appellant in Penn-

sylvania amounted to $22,440 (R. 179a, 180a, 183a) and the taxable value of appellant's franchise as determined is $3,327,426.

Prior to 1935, the capital stock of both domestic and foreign corporations, at an appraised actual cash value, was taxed under Sections 20 and 21 of the said Act of 1889. This tax was held to be a tax on property.

Delaware, Lackawanna & Western R. R. Co. v. *Pennsylvania,* 198 U. S. 341;
Commonwealth v. *Standard Oil Co.,* 101 Pa. 119.

The said Act of 1935, which amended Sections 20 and 21 of the Act of 1889, continued in Section 21(a) the tax on domestic corporations as theretofore, and in Section 21(b), imposed tax on "the taxable value" of the capital stock of foreign corporations to be determined by the formula provided therein. The basis of the tax on both domestic and foreign corporations continued to be the *appraised* actual value in cash of the whole capital stock as provided in Section 20. In Section 21(c) it is provided that domestic and foreign corporations liable to tax under Section 21 "shall not be required to pay any *further* tax on the mortgages, bonds, and other securities owned by them * * *." (Italics ours.) This is indicative that the tax imposed on foreign corporations under Section 21(b) is a tax on property.

A tax upon property or measured by property *according to a valuation* is a property tax because in such tax one of the incidents of the tax is that the tax burden increases or decreases as the value of the property fluctuates; but a tax measured by property *not requiring a valuation and imposed directly by the Legislature* is a franchise tax. In the cases of *Bank of Commerce* v. *New York City,* 2 Black 620 (1862); *Bank Tax Case,* 2 Wall. 200 (1864); and *Society for Savings* v. *Coite,* 6 Wall. 594 (1867), this dis-

tinction is made clear and has been adhered to since that time. Under this test, the tax imposed on foreign corporations under the said Act of 1935 is a property tax. The decisions of the Supreme Court of the United States, arising under the franchise tax statutes of other states are not decisive of this issue since there the tax is measured by capital stock or property, *not requiring a valuation,* and is imposed directly by the Legislature. As illustrative see:

International Shoe Co. v. *Shartel,* 279 U. S. 429;
Ford Motor Co. v. *Beauchamp,* 308 U. S. 331.

Furthermore, the opinions of the Supreme Court of Pennsylvania on this question are inconsistent. In the instant case, 350 Pa. 253, 38 A. (2d) 325, where that Court relied upon its opinion in *Commonwealth* v. *Columbia Gas & Electric Corp.,* 336 Pa. 209, 8 A. (2d) 404, it was held that the tax was on the franchise or privilege of doing business in Pennsylvania. In *Arrott's Estate,* 322 Pa. 367, 185 Atl. 697, and in *Commonwealth* v. *Union Trust Company of Pittsburgh,* 345 Pa. 298, 25 A. (2d) 294, it was held that the tax on foreign corporations is in effect "a tax on capital stock" and that "the property included within the folds of the Franchise Tax Act embraces the same elements upon which the capital stock tax was based."

In the title of said Act of 1935, it is stated that there is being substituted "a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations." No mention is made in Section 21(b) or elsewhere that the tax is on the franchise privilege of doing business in Pennsylvania. The tax imposed on the property of foreign corporations prior to 1935 cannot be converted into a privilege tax by *calling* it such. The Supreme Court

of the United States should take jurisdiction to determine the character of the tax by its operations and by its incidents.

Educational Films Corp. v. *Ward*, 282 U. S. 379, 387;
The Macallen Co. v. *Mass.*, 279 U. S. 620, 625, 626;
Schuylkill Trust Co. v. *Pennsylvania*, 296 U. S. 113, 119.

(b)

Is the method of allocation provided in the Act of 1935 inherently arbitrary and unreasonable?

The Supreme Court of Pennsylvania upheld the validity of the method of allocation consisting of tangible property, payroll and receipts fractions for the reason that the use of one or more of these fractions had been approved by the Supreme Court of the United States in the following cases arising under the franchise tax statutes of other states:

Ford Motor Co. v. *Beauchamp*, 308 U. S. 331;
Roberts & Schaefer Co. v. *Emmerson*, 271 U. S. 50;
International Shoe Co. v. *Shartel*, 279 U. S. 429.

These cases are not decisive of the issue for the following reasons:

1. In these cases, the franchise tax based on "capital stock" does not require a valuation and is imposed directly by the Legislature. "Capital stock" as used means the business capital of the corporation as shown by its books irrespective of asset, property or going concern values and does not include the value of good will, franchise, or privileges. Under the Pennsylvania Act of 1935, the actual value in cash of the whole capital stock of foreign corporations, which is the basis of the tax under said Act, does

require a valuation and appraisal. The tax is not imposed directly by the Legislature; and capital stock as used represents all property and assets at going concern values and includes the value of good will, franchises or privileges.

2. In the *Ford Motor Co.* case, the allocation fraction of gross receipts from *intrastate* business over total gross receipts was used. In the instant case, there have been included in the numerator of the gross receipts fraction not only *intrastate* receipts, but *all* of the receipts from *interstate* transactions in which the orders were negotiated from Pennsylvania sales offices but the sales were consummated outside Pennsylvania. We will further distinguish this case at a later point.

3. In the *Shartel* case, the allocation fraction used was that of tangible and intangible assets in the taxing state over total assets; and the allocation fraction used in the *Emmerson* case was that of tangible and intangible assets in the taxing state plus volume of business in the state over total assets plus total volume of business. In the latter case, the addition of the business factor did not produce an average percentage in excess of the percentage of the asset factor. In both cases, intangible assets were allocated by the application of the rules of business situs; and in both cases, since the whole capital stock was used as the basis of the tax, representation was given in the allocation fraction to the *entire* enterprise when the factor of total assets was used. *The situation is entirely different in the instant case.* Here, 58% of appellant's total assets is comprised of intangible assets. The actual value of appellant's whole capital stock represents the value of its assets and franchises everywhere, and when the three allocation fractions (as provided in the Act of 1935 which excludes intangibles and does not give representation to all sources of value) are applied to appellant's whole capital stock value, an

unconstitutional result is produced. See *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, 129 N. E. 202, certiorari denied 256 U. S. 702.

Furthermore, the Pennsylvania Supreme Court, conceding that the three Pennsylvania allocation fractions are representative of *business activity* producing *net income*, holds that they are equally appropriate either for the determination of a franchise tax based on capital stock or on net income, citing *Butler Bros.* v. *McColgan*, 315 U. S. 501. This conclusion is erroneous because:

1. When the Legislature selects net income as the basis of the tax, the taxable value of the franchise is greater or less depending upon the amount of net income or the amount of business produced by its exercise; but when, as in the Act of 1935, capital stock representing property and assets value is selected as the basis of the tax, the taxable value of the franchise depends upon the amount of capital employed in its exercise in the taxing state. The Supreme Court of Pennsylvania had confused these two different standards or measures of the value of the franchise which is taxed.

2. Different business functions or activities producing income require employment of varying amounts of capital or assets so that there can be no presumption that capital or property is employed in the same ratio as business activities. This is recognized in the states imposing both a franchise tax based on capital stock and on income where different allocation fractions are used for each tax. The Massachusetts statute is illustrative. It imposes a tax on domestic and foreign corporations with respect to the carrying on or doing of business within the state. The tax is computed on two bases: the one, on corporate excess consisting of the capital stock value of intangible assets, which is allocated by the use of a single fraction made up of *the*

value of tangible and intangible assets employed in the state over total assets; and the other on net income, which is allocated by the use of the same three fractions as are provided in the Pennsylvania Act of 1935. See *Atlantic Lumber Co.* v. *Commission,* 298 U. S. 553, and *Alpha Portland Cement Co.* v. *Mass.,* 268 U. S. 203.

3. The allocation fractions in the *McColgan* case are representative only of business activities producing the principal business income and are used only to allocate such income, the income from intangibles being specifically allocated according to situs of the intangibles.

(c)

Even if the tax imposed by the Act of 1935 be a franchise tax, does the method of allocation used result in imposing tax upon, or measuring the tax by, property of appellant located and employed outside of Pennsylvania?

The Supreme Court of Pennsylvania held that it did not. Having found that all of appellant's property no matter where located and employed were used in a unitary enterprise, and that their use affected the value of the Pennsylvania franchise, it said:

> "The tax is not imposed *upon* any of this property, but upon the value of the Pennsylvania franchise, *measured* by the capital stock related to the business activity of appellant in this State. The right of the State to use such a measure to reasonably determine the enhancement of the value of the local franchise by the employment of extra-territorial property is fully discussed in the Ford Motor Company case and need not be here reviewed."

Relying upon its prior decision in *Commonwealth* v. *Columbia Gas and Electric Corp.,* 336 Pa. 209, 8 A (2d) 404, the court held that the use of the three allocation fractions

as provided in the Act of 1935, applied to the whole capital stock value of appellant's unitary enterprise, was a reasonable and just attempt to determine the enhanced value of the local franchise exercised by appellant in Pennsylvania.

It is submitted that the taxable value of appellant's franchise in Pennsylvania as so determined is based upon the value of appellant's property located and employed outside of Pennsylvania and that such result is contrary to the decisions of the Supreme Court of the United States.

The Supreme Court of Pennsylvania confuses two different standards or measures of the value of a franchise, the one based on net income and the other based on capital stock representing property and asset values, and applies the same principles to both. When net income is the measure, an allocation, based on the business activities producing the income, is proper. In the instant case, capital stock made up *wholly* of property and asset values is the measure. Therefore, the allocation ought to be made on the basis of property and assets *producing* the capital stock value.

The vice in the instant case is in the method of allocation as was found in *Fargo* v. *Hart*, 193 U. S. 490, 502. When the three allocation fractions of tangible property, payroll and receipts, *in which no representation is given to appellant's intangible assets comprising 58% of its total assets,* are applied to appellant's whole capital stock value (with a minor exception), there is mathematically allocated to Pennsylvania the capital stock value of *all* of appellant's intangible assets to the extent of the average percentage of the allocation fractions. And this is done regardless of the location, situs and use of the intangibles. This is particularly true of appellant's investments in United States, state, county, and municipal securities which were located and employed wholly outside of Pennsylvania (R. 178a); and in

shares of subsidiary corporations which had no property and conducted no business in Pennsylvania (R. 178a). On the authority of *National Leather Co.* v. *Mass.*, 277 U. S. 413, property and assets not located *or* employed in the taxing state may not be included in the taxable value of the franchise based on property and asset values.

Under the method of allocation used in the instant case, the result is not the determination of the true value of property and assets employed in the exercise by appellant of its franchise in Pennsylvania as correlated with all its property and assets; but, on the other hand, the result is produced of adding to the value of appellant's property and assets in Pennsylvania the value of its assets located and employed wholly outside of Pennsylvania.

Under the circumstances, the Supreme Court of the United States has held that whether the tax be a property or franchise tax, the tax may not be imposed upon or measured by property and assets located or employed, or upon activities carried on, outside of the taxing state.

James v. *Dravo Contracting Co.*, 302 U. S. 134;

Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S 77;

Wallace v. *Hines*, 253 U. S. 66, 69, 70;

Fargo v. *Hart*, 193 U. S. 490;

Delaware, Lackawanna & Western R. R. Co. v. *Pennsylvania*, 198 U. S. 341.

(d)

The case of *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331

This case, relied upon by the Supreme Court of Pennsylvania, is not applicable in the instant case for the following reasons:

1. As construed in *Southern Realty Co.* v. *McCallum*, 65 F. (2d) 934, certiorari denied, 290 U. S. 692, the Texas statute grants a limited license to do business for one year,

which must be renewed. It is in the nature of an entrance fee charged at the time of admission to do business, such as was involved in *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22. The tax is imposed at the beginning of the year, and is for the opportunity to do the year's business measured *by the business capital or business potency about to be used.* After payment of the tax, the corporation may employ *all* its capital and business potency in its business in Texas without increasing the amount of the tax for that year. For this reason, the origin, form, and location of capital at the time the tax is charged is not important. It is granted the privilege to employ all its capital and if it does not, that is no concern of the state.

2. The amount of the tax is fixed and does not vary with the amount of capital employed or business done during the tax year. If the tax is not paid by July 1st, the right to do business is forfeited. No provision is made for assessment and distraint of the tax. If the tax report and payment of tax is rejected, the Attorney General must file suit for collection.

3. The situation in Pennsylvania is wholly different:

(a) The Certificate of Authority is granted for an unlimited period of time, and may be revoked only for cause. The fee paid for it is not connected with the disputed tax in the instant case.

(b) The franchise tax, if so it be, is imposed *after* the year's business for the privilege of having exercised its franchise and is measured by the amount of capital that was actually employed. Therefore, location, and use of capital employed are important.

(c) Provisions exist for assessment and distraint of the tax. Failure to pay the tax does not result in the forfeiture of the right to do business.

(e)

Do the Act of 1935 and the tax imposed on appellant thereunder deny to it the equal protection of the laws?

Appellant owned United States securities valued at $14,901,015 (R. 178a) and shares of subsidiary corporations valued at $1,663,499 (R. 177a, 178a). Prior to 1935, such investments when owned by both domestic and foreign corporations were not taxed. Under the Act of 1935 which retained the same basis of tax on both domestic and foreign corporations, to wit, the actual value in cash of the whole capital stock, such investments were included in the computation of the tax on appellant and increased its tax by $4,537.61 but were exempted from tax when owned by domestic corporations of the same kind. Thus the tax base for domestic corporations is less than the whole because of exemptions allowed but the tax base of appellant and other foreign corporations is *the full amount* of the capital stock value attributed to Pennsylvania.

The Supreme Court of Pennsylvania held that this difference in treatment of such investments for tax purposes under the Act of 1935 did not deny to appellant the equal protection of the laws. It cited the case of *Kansas City, etc. & R. R. Co.* v. *Stiles*, 242 U. S. 111, for the proposition that "a state may differentiate in its method of taxing between domestic and foreign corporations", but it is submitted that this case held that the domiciliary state could impose a greater tax burden on its creatures than on foreign corporations, and, therefore, does not support the converse proposition.

It held also that since the tax on appellant was a franchise tax, the investments were not taxed but were used only in the *measurement* of the base of the tax. Even so, it is submitted that the tax burden on appellant has been in-

creased by the inclusion of such investments in the computation of the tax.

It further held that, in any event, appellant is not discriminated against because, if it were a domestic corporation and its intangible assets had a domiciliary situs in Pennsylvania, it would pay a greater tax than that imposed on it. No authority is cited for this proposition in disposing of appellant's contention of denial of equal protection of the laws. It is without support in the law and presupposes a situation that doesn't exist.

The decisions of the Supreme Court of the United States in *Southern Railway Co.* v. *Greene*, 216 U. S. 400, and in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, are contrary to the rulings of the Supreme Court of Pennsylvania on the question presented. These cases hold that foreign corporations, *after having been admitted to do business*, stand equal and are to be classified with domestic corporations of the same kind. In these two cases, the foreign corporations were held to be denied the equal protection of the laws; in the *Greene* case, because a franchise tax measured by capital employed was imposed on the foreign corporation and not on domestic corporations of the same kind, and in the *Harding* case, because a foreign fire insurance company was taxed upon 100% of the full value of its net receipts whereas domestic fire insurance companies were taxed upon only 30% of the full value of personal property, net receipts having been construed as personal property.

(f)

Do the Act of 1935 and the tax imposed on appellant thereunder impair the obligation of the contract between appellant and the Commonwealth?

The appellant contended that a contract between it and the Commonwealth was created by the Act of May 28, 1907,

P. L. 226, which was later repealed and its provisions written into Section 1010 of the Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes, section 2852. That section provides:

> "A foreign corporation, which shall have received a Certificate of Authority under this act, * * *, shall be subject to the same liabilities, restrictions, duties and penalties now in force or hereafter imposed upon domestic corporations * * *."

The appellant contended that the provisions of the contract were impaired when its investments in United States securities and in shares of subsidiary corporations were included in the computation of the tax on it under the Act of 1935 and its tax thereby increased to the extent of $4,537.61, whereas such investments were exempted from tax when owned by domestic corporations of the same kind.

The Supreme Court of Pennsylvania, without discussing whether a contract existed and what its terms were, disposed of this constitutional objection of appellant by holding that appellant had failed to prove discrimination by the State against it as a foreign corporation. This conclusion is based upon the assumption that an equivalent tax burden is imposed on domestic and foreign corporations under the Act of 1935. That assumption, in turn, is based upon a comparison of the tax which appellant would pay if it were a domestic corporation and its intangible assets had a domiciliary situs in Pennsylvania, with the tax imposed on it as a foreign corporation.

Here again no authority is cited for the use of any such comparison in support of the conclusion reached. The comparison is without authority in the law and is based upon a situation that doesn't exist.

The decision of the Supreme Court of the United States in the case of *American Smelting and Refining Co.* v.

Colorado, 204 U. S. 103, is contrary to the ruling of the Supreme Court of Pennsylvania, on the question presented. There it was held that the provisions of the Colorado law which were similar to the provisions of Section 1010 of the Pennsylvania Business Corporation Law of 1933 created a contract with foreign corporations, *after they had been admitted to do business,* which guaranteed to them equality of taxation with domestic corporations; and that this contract was impaired by an Act imposing a state license tax on domestic corporations at the rate of *two cents* upon each $1,000 of their capital stock and on foreign corporations at the rate of *four cents* upon each $1,000 of their capital stock. In the instant case, although the tax rate on both domestic and foreign corporations is five mills, the allowance of exemptions to domestic corporations that are not allowed to foreign corporations produces in effect a lower tax rate for domestic corporations.

(g)

Does the Act of 1935 as construed and applied in imposing tax on appellant unduly and unlawfully burden interstate commerce?

All of appellant's manufacturing plants were outside of Pennsylvania. It had an extensive sales organization throughout the United States. Two sales offices were located in Pennsylvania, one at Pittsburgh and the other at Philadelphia. At each location, a small inventory of goods was kept in a public warehouse. Salesmen connected with these two offices obtained orders which gave rise to sales in the amount of $7,224,347.

Except for sales of $171,773 made from Pennsylvania stocks to Pennsylvania customers the remainder of the sales in the amount of $7,052,574, arising from orders obtained by the Pennsylvania sales offices, were made in in-

terstate commerce. They were controlled by, and approved or rejected at, appellant's home office in Chicago. There, the customers' credit was passed upon, their accounts were kept, and invoices were made out. Shipments were made from stocks or from mills outside of Pennsylvania direct to the customers, and remittances were made to Chicago.

In the computation of the tax against appellant the intrastate receipts of $171,773 and the *whole* of the interstate receipts of $7,052,574 were used in the numerator of the gross receipts allocation fraction.

Appellant contended that the use of the *whole* of the interstate receipts, instead of only a part thereof attributable to that proportion of the interstate transaction in Pennsylvania, unduly and unlawfully burdened interstate commerce.

The Supreme Court of Pennsylvania rejected appellant's contention. It said:

> "* * * the tax is imposed upon the privilege of doing business here, measured by capital stock. It is in no sense a tax on sales or on interstate transactions. Sales enter into the determination of the tax only as an index of business activity in this State. * * * The burden imposed by the Act of 1935 is incidental and reasonable."

The fault with the Court's reasoning is that it has used the *whole* of the interstate sales as representing Pennsylvania activities; and the use of these receipts produces $13,343.63 of the tax of $16,637.38 imposed on appellant. The cases cited by the Court arose under wholly different facts than those in the instant case.

The decisions of the Supreme Court of the United States are contrary to the ruling of the Supreme Court of Pennsylvania on the question presented.

The use of the *whole* of the interstate receipts has been approved only where local management and manufacturing activities in the taxing state preceded the sale and where the amount of the tax did not exceed that which could have been imposed directly on the property;

Hump Hairpin Manufacturing Co. v. *Emmerson,* 258 U. S. 290;

United States Glue Co. v. *Town of Oak Creek,* 247 U. S. 321.

or where the *whole* of the interstate activity was carried on in the taxing state;

Western Live Stock v. *Bureau,* 303 U. S. 250.

In the instant case, appellant had property of only $22,440 employed in Pennsylvania (R. 179a, 180a) and all its local management and manufacturing activities were carried on outside of Pennsylvania.

Where gross receipts are used to measure the true value of property and capital employed in the taxing states—as appears to be the theory in the instant case—the Supreme Court of the United States has approved the use of intrastate receipts and *the part* of the interstate receipts attributable to the taxing state,—

Maine v. *Grand Trunk Rwy. Co.,* 142 U. S. 217;
Cudahy Packing Co. v. *Minnesota,* 246 U. S. 450;
Pullman Co. v. *Richardson,* 261 U. S. 330.

In *Matson Navigation Co.* v. *State Board,* 297 U. S. 441, the use by California of only 22.2% of interstate receipts was approved. Under the Texas statute, no interstate receipts are used, it being stated in *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331, at p. 335:

> "The tax here levied is not for the privilege of engaging in any transaction across state lines or activity carried on in another state."

VIII

Opinions

We are including in the Appendix hereto, the opinion of the Supreme Court of Pennsylvania in the instant case; its opinion in the case of *Commonwealth* v. *Ford Motor Co.*, 350 Pa. 236, 38 A (2d) 329, which was rendered on the same date and to which it referred in the instant case; and its opinion in the case of *Commonwealth* v. *Columbia Gas & Electric Corp.*, 336 Pa. 209, 8 A (2d) 404, upon which it relied in both cases.

Conclusion

We therefore respectfully submit; that the questions arising in this case under the Constitution of the United States are substantial; that the decision of the Supreme Court of Pennsylvania affirming the decision of the Common Pleas Court of Dauphin County, Pennsylvania, should be reversed; and that an appeal should be allowed in order that this may be done.

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December 20, 1944.

No. 86

AN ACT

To further amend sections twenty and twenty-one of the act, approved the first day of June, one thousand eight hundred and eighty-nine (Pamphlet Laws, four hundred twenty), entitled "A further supplement to an act, entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine," by substituting a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations; imposing a tax for a limited period upon that portion of the capital stock of certain corporations, joint-stock associations, limited partnerships, and companies which were heretofore exempt; increasing the rate of tax on the capital stock of fire and marine insurance companies; and making an appropriation.

Taxation.

Sections 20 and 21, of June 1, 1889 (P. L. 420), as last amended by act of April 25, 1929 (P. L. 657), further amended.

Section 1. Be it enacted, &c., That sections twenty and twenty-one of the act, approved the first day of June, one thousand eight hundred and eighty-nine (Pamphlet Laws, four hundred twenty), entitled "A further supplement to an act, entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine," as last amended by the act, approved the twenty-fifth day of April, one thousand nine hundred and twenty-nine (Pamphlet Laws, six hundred fifty-seven), are hereby further amended to read as follows:

Officers of certain corporations to make annual reports to Department of Revenue.

Section 20. That hereafter, except in the case of corporations of the first class and cooperative agricultural associations not having capital stock and not conducted for profit, banks, savings institutions, title insurance, or trust companies, building and loan associations, and foreign insurance companies, it shall be the duty of the president, vice-president, secretary, or treasurer of every corporation having capital stock, every joint-stock association, limited partnership, and every company whatsoever, now or hereafter organized or incorporated by or under any laws of this Commonwealth, and of every corporation, joint-stock association, limited partnership, and company whatsoever, now or hereafter incorporated or organized by or under the law of any other State or Territory of the United States, or by the United States, or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership or joint-stock association, company, or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner, to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by

When report must be filed.

it. [stating specifically] *Such report shall, in addition to any other information required by the Department of Revenue, set forth:*

Contents of report.

First. The amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.

Second. Its debt account.

Third. Its income account, together with the disposition of any net income, and its profit and loss statement.

Fourth. Its general balance sheet.

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.

Sixth. [The proportion of its capital stock invested in and actually and exclusively employed and used in manufacturing within the Commonwealth during the year for which report is made.]

[Seventh.] A valuation and appraisal, in the manner hereinafter provided, of the capital stock of the said corporation, company, joint-stock association, or limited partnership, at its actual value in cash as it existed at the close of the year for which the report is made.

Affidavit of officers.

The affidavit of two of the officers of such corporation, limited partnership, joint-stock association or company, shall be attached to said report. Such affidavit shall be in the form required by the Department of Revenue, but shall state, in addition to any other averments required by the department, that, with fidelity and according to the best of their knowledge and belief, the affiants have estimated, valued and appraised, as shown in said report, the capital stock of the said corporation at its actual value in cash as it existed at the close of the year for which report is made; not less, however, than, first, the average which said stock sold for during the year; and second, not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends, expended in betterments, or carried into the surplus or sinking fund; and third, not less than the actual value indicated or measured by consideration of the intrinsic value of its tangible property and assets, and of the value of its good will and franchises and privileges, as indicated by the material results of their exercise, taking also into consideration the amount of its indebtedness.

Determination of actual value of capital stock.

Procedure.

The time for filing reports may be extended; taxpayers may be permitted to file their reports on a fiscal year basis; the procedure in case the Department of Revenue is not satisfied with the appraisement made by

33

the officers of the taxpayer, and the penalties for failing to file reports and pay taxes shall be as prescribed by law.

Tax of five mills on capital stock of domestic corporation, etc.

Section 21. *(a)* That every *domestic* corporation, other than corporations of the first class and cooperative agricultural associations not having capital stock and not conducted for profit, and every joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to, and pay into the Treasury of the Commonwealth annually, through the Department of Revenue, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section. [and it]

Tax of five mills on capital stock of foreign corporation, etc.

(b) Every foreign corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a franchise tax at the rate of five mills upon a taxable value to be determined in the following manner:

The actual value of whole capital stock shall be divided into 3 equal parts.

The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts.

(1) Of one third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the value of the taxpayer's tangible property situated within the Commonwealth, and whose denominator is the value of all the taxpayer's tangible property wherever situated.

(2) Of another third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the expenditures of the taxpayer for wages, salaries, commissions, or other compensation to its employes, and assignable to this Commonwealth as hereinafter provided, and whose denominator is the total expenditures of the taxpayer for wages, salaries, commissions, or other compensation to all its employes.

(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business.

Taxable value.

The sum of the amounts, determined in accordance with the foregoing three rules, shall be the taxable value.

Where only two of the rules are applicable.

In a case where only two of the foregoing three rules are applicable, the remaining third equal part of the value of the entire capital stock shall be divided into two equal parts, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, that part of the entire capital stock attributed to business carried on within the Commonwealth shall be determined solely by that rule.

If only one rule is applicable.

Amount assignable to the Commonwealth of expenses of taxpayer for wages, etc.

The amount assignable to this Commonwealth of expenditures of the taxpayer for wages, salaries, commissions, or other compensation to its employes, shall be such expenditures for the taxable year as represent the wages, salaries, commissions, or other compensation of employes not chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the taxpayer outside the Commonwealth.

Amount of gross receipts from business assignable to the Commonwealth.

The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be the amount of its gross receipts for the taxable year from, (1) sales, except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the taxpayer outside the Commonwealth, and sales otherwise determined, by the Department of Revenue, to be attributable to the business conducted on such premises, and (2) rentals or royalties from property situated or from the use of patents within this Commonwealth. If a taxpayer maintains an office, warehouse, or other place of business in a state other than this Commonwealth for the purpose of reducing its tax under this subsection, the Department of Revenue shall, in determining the amount of its gross receipts from business assignable to this Commonwealth, include therein the gross receipts from sales attributed by the taxpayer to the business conducted at such place of business in another state.

If a taxpayer maintains office, etc., outside of State to reduce the amount of tax.

Application of a rule.

A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a taxpayer for wages, salaries, commissions, or other compensation, or the gross receipts of the taxpayer are found to be situated, incurred, or received without the Commonwealth.

(c) It shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association, or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the treasury of the Commonwealth within the time prescribed by law for the payment of State taxes settled by the Department of Revenue: Provided,

Proviso.

That for the purposes of this act, interest in limited partnerships or joint-stock associations shall be deemed to be capital stock, and taxable accordingly: Provided also, That corporations, limited partnerships, and joint-stock associations, liable to a tax [on capital stock] under this section, shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder; but corporations, limited partnerships, and joint-stock associations, owning or holding such securities as trustees, executors, administrators, guardians, or in any other manner than for the whole body of stockholders or members thereof as sole equitable owners in remainder, shall return and pay the tax imposed by this act upon all securities so owned or held by them, as in the case of individuals: [And provided] *Provided further, That the* [provisions of this section] *tax of five mills, imposed by this section on reports filed for the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six, or for the fiscal years beginning in the calendar years one thousands nine hundred and thirty-five and one thousand nine hundred and thirty-six,* shall [not] apply to the taxation of the capital stock of corporations, limited partnerships, and joint-stock associations, organized for laundering, for the processing and curing of meats, their products and by-products, [or] *and* for manufacturing purposes, *excepting companies engaged in the distilling of liquors: Provided further, That after said two year period, the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships, and joint-stock associations, organized for laundering, for the processing and curing of meats, their products and by-products, or for manufacturing purposes,* which is invested in and actually and exclusively employed in, carrying on laundering, the processing and curing of meats, their products and by-products, or manufacturing within the State, excepting companies engaged in the [brewing or] distilling of [spirits or malt] liquors, and such as enjoy and exercise the right of eminent domain; but every corporation, limited partnership, or joint-stock association organized for the purpose of laundering, or processing and curing meats, their products and by-products, or manufacturing, shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the laundering or manufacturing business, or the business of processing and curing meats, their products and by-products, in addition to the local taxes assessed upon its property in the district

Proviso.

Securities exempt from the tax.

Securities held in trust.

Proviso.

Certain corporations exempt.

where located; it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the laundering or manufacturing plant and business, or the plant and business used in the processing and curing of meats, their products and by-products: Provided further, In case of fire and marine insurance companies, the tax imposed by this section shall be at the rate of [three] *five* mills upon each dollar of the actual value of the whole capital stock: Provided, That nothing in this act shall be so construed as to apply to building and loan associations chartered by the State of Pennsylvania.

Proviso.

Proviso.

Constitutional clause.

Section 2. If this act is declared unconstitutional by a final judgment, order, or decree of a court of competent jurisdiction, all the provisions of section twenty-one of the act, amended by this act, pertaining to the taxation of the capital stock of foreign corporations, which were made inapplicable and inoperative thereto by this amendment, shall thereupon become operative and applicable in respect to such corporations, from the effective date of this act, and such corporations shall for that period and thereafter be taxed to the same extent and in the same manner, as if this amendment had not been enacted. In such event any taxes, which were settled under this act, shall, to the extent that such taxes have been paid and are unrefunded, be credited against the taxes settled and imposed for the same period, under the provisions of said section twenty-one, which are again made operative and applicable to foreign corporations by this section: Provided, That, if such credit exceeds the taxes due, the excess may be refunded upon application being made to the Board of Finance and Revenue in the manner prescribed by law.

Proviso.

Act to be retroactive.

Section 3. The provisions of this act shall be retroactive to the first day of January, one thousand nine hundred thirty-five, so that capital stock of domestic corporation, limited partnerships, and joint-stock associations, organized for laundering, for the processing and curing of meats, their products and by-products, and for manufacturing purposes, shall pay the tax imposed for the calendar years one thousand nine hundred thirty-five and one thousand nine hundred thirty-six, or for the fiscal years, beginning in the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six in the same fashion as other corporations, limited partnerships, and joint-stock associations.

When effective.

Section 4. This act shall become effective immediately upon its final enactment, and its provisions shall be applicable to the settlements of franchise taxes on foreign corporations for the year ending the thirty-first day of December, one thousand nine hundred and thirty-

five, or any fiscal years ending in the calendar year one thousand nine hundred and thirty-six.

Section 5. The sum of eighteen million dollars ($18,000,000), derived from the tax imposed under the provisions of this act on reports filed for the year one thousand nine hundred and thirty-five, shall be used only for unemployment relief and for such purposes is hereby appropriated. Unemployment relief.

APPROVED—The 16th day of May, A. D. 1935.

GEORGE H. EARLE

The foregoing is a true and correct copy of Act of the General Assembly No. 86.

Edna L. Lawrence

Secretary of the Commonwealth.

APPENDIX "B"

[186]

IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

May Term, 1943

No. 24

COMMONWEALTH OF PENNSYLVANIA

v.

THE QUAKER OATS COMPANY, Appellant,

May Term, 1943

No. 25

COMMONWEALTH OF PENNSYLVANIA, Appellant

v.

THE QUAKER OATS COMPANY

Appeals from Final Judgment of the Court of Common Pleas of Dauphin County in No. 506 Commonwealth Docket, 1938.

Opinion of the Court

ALLEN M. STEARNE, J.

These appeals, like the appeal in *Commonwealth v. Ford Motor Company* (opinion this day filed), are from the judgment of the court below affirming, with some modifications, the resettlement by the Department of Revenue of the franchise tax of a foreign corporation. As in that case, appellant contends first that the Commonwealth erred in applying the statutory formula of the Act of May 16, 1935, P. L. 184, 72 PS 1901, and secondly, that, if applied correctly, the formula results in unconstitutional taxation. It

is unnecessary to repeat here the observations made in the *Ford Motor Company* case concerning the purpose, structure and operation of the Act of 1935, nor to reiterate at any length our opinions there expressed regarding the incidence and constitutionality of the franchise tax, generally. We will, however, review in some detail the facts of appellant's case and its contentions that the tax imposed upon it violates the statute and appellant's constitutional rights.

The Quaker Oats Company was incorporated under the laws of New Jersey to manufacture and deal in cereals and cereal products. In 1933 it received a Certificate of Authority to transact in this Commonwealth the business of "selling and dealing in cereals and cereal products." In the tax year involved in this appeal, 1935, appellant's principal office was in Chicago, Illinois. It was engaged in the purchase, storing and manufacturing of cereal and cereal products, employing for these purposes land, buildings, grain, elevators, railroad equipment, machinery, mills and other tangible property located outside of Pennsylvania. It controlled and owned all, or a majority, of the shares of fifteen subsidiary companies, including a hydraulic power corporation which supplied power to the parent company for manufacturing purposes, and several companies domiciled in Europe and South America. Three of these subsidiaries were inactive in 1935. Throughout the United States and abroad it maintained a vast selling enterprise for the marketing of its own products and the products of its subsidiaries. The total value of its assets was $60,821,913, including working capital of $14,901,015 in United States Government securities, and $1,117,545 in state, county, and municipal obligations, used in the purchase of raw cereals.

In this State appellant had two sales offices, one at Pittsburgh and the other at Philadelphia. Here orders were taken by its salesmen for flour, corn meal, animal and poultry foods, breakfast foods and other cereal products, some of which were sold in packages and some in bulk. A local inventory of goods, insufficient to supply all orders originating in Pennsylvania, was stored here in public warehouses. Other tangible property included automobiles used by the salesmen, and office furniture and equipment. The

total value of appellant's tangibles in this Commonwealth was $22,440. None of the subsidiary corporations transacted any business in Pennsylvania or owned any tangible property here. The Pennsylvania payroll of appellant was $143,259. Of its total gross receipts of $66,067,332, *more than one-tenth,* or $7,224,347, was assigned by the court below to Pennsylvania. Bank accounts were maintained at Pittsburgh and Philadelphia.

Upon the basis of appellant's report, the franchise tax for 1935 was settled at $4,655, which was subsequently revised to $28,645. Appellant obtained a review whereupon the tax was resettled at $16,495. On appeal from the resettlement, the court below excluded from the value of the capital stock in the formula the sum of $114,196 which represented the value of the stock of the inactive subsidiaries, thereby reducing the multiplicand. However, the numerators of the three allocative fractions were increased, with the result that, on the final determination, the tax was increased to $16,637.

Appellant contends, as did the appellant in the *Ford Motor Company* case, that it is a *multiform* enterprise. It has attempted to segregate its activities into three functions, which, it maintains, are unrelated, namely: (1) the purchase and storage of grains, (2) the manufacture of cereals and cereal products, and (3) selling and dealing in cereal products. As only the last of these functions is carried on in this State, appellant asserts that the value of capital stock employed in the first two functions should be excluded from the multiplicand. Actually, however, the record indicates that such segregation of functions is entirely artificial, and that appellant is engaged in an unitary enterprise. In its proof, appellant did not even attempt to segregate the wages, tangible property and gross receipts of the three "unrelated" functions, so that there is, on this record, no factual basis for a revision of the allocative fractions in the formula. Appellant's estimate of capital employed exclusively in the "selling and dealing" function, derived from its corporate balance sheet, is conceded to represent assets "which were, *or a part of which may have been,* employed in selling." Its witnesses testified that the production and sale of packaged goods and

goods in bulk by the company were inter-related, that they enjoyed a common source of supply, that the national advertising and goodwill of the whole enterprise affected sales in Pennsylvania, that the corporate revenues were derived from the ultimate sale of the products resulting from the purchases and manufacturing. Obviously, the purchasing, storing and manufacturing processes of appellant were not complete and distinct corporate activities, or businesses. They were not self-sustaining or an end in themselves. They were conducted in aid of the selling activities, with which they are interlocked and integrated. The entire enterprise is unitary in purpose and result. This is not a situation like that referred to in *Adams Express Co.* v. *Ohio,* 165 U. S. 194, or that before us in *Commonwealth* v. *Columbia Gas and Electric Corp.,* 336 Pa. 209, 8 A. 2d 404, in which a corporation conducts diverse forms of business having no unity save unity of ownership, and no common relation save by separate contributions to the total revenue of the corporation. This is a true unitary enterprise, having its inception in the purchase, storing, and manufacture of cereals and cereal products, and its consummation in their sale. The court below has so found, and as the record sustains the finding, it is conclusive upon us.

We have, in the *Ford Motor Company* case, rejected the contention, made also by this appellant, that the formula employed by the legislature in Section 21 (b) of the Act of 1935 to evaluate the franchise of a foreign corporation doing business here is inherently arbitrary and unreasonable, and that it results in taxing property and business outside of this State. We have also rejected the arguments, advanced again in this appeal, that the tax on the franchise of foreign corporations imposed by the Act of 1935 is a property tax; that it violates the equal protection clause of the Federal Constitution, and our Constitution, by discriminating against foreign corporations in favor of domestic corporations; that it is not uniformly imposed on corporations in the same classification, and that it contravenes the clauses of the Federal and State constitutions prohibiting the impairment of the obligations of contracts

and the taking of property without due process of law. No purpose would be served by repeating here what we said in that case.

Appellant has failed to prove, with respect to its specific tax, that any of these constitutional provisions has been violated. The court below found that all of the corporate assets were, with the exception of its investments in the stock of three inactive subsidiaries, actively used in the unitary enterprise of appellant, and that their use affected the value of the Pennsylvania franchise. The tax is not imposed *upon* any of this property, but upon the value of the Pennsylvania franchise, *measured* by the capital stock related to the business activity of appellant in this State. The right of the State to use such a measure to reasonably determine the enhancement of the value of the local franchise by the employment of extraterritorial property is fully discussed in the *Ford Motor Company* case, and need not be here reviewed.

Nor is it necessary to devote additional discussion to appellant's contention that the tax falls upon exempt Federal, State and municipal securities. The court below has found, and appellant concedes, that these securities "were employed or held as a reserve by [appellant] in its purchasing business." As the purchasing function was related by integration to the selling function, and as it affected the value of appellant's franchise in Pennsylvania, the inclusion of these securities in the formula producing the tax base was proper. They, themselves, were not taxed.

A considerable portion of appellant's argument is directed to alleged error in the composition of the gross receipts fraction of the formula. The Commonwealth and the court below used, as the numerator, the total amount of sales originating in, and attributable to the two sales agencies operated in this State by appellant. Appellant contends that there should have been excluded all sales negotiated by salesmen of the Pennsylvania agencies but consummated by the approval of the home office. Section 21 (b) of the Act provides: "The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be the amount of its gross receipts for the

taxable year from, (1) sales, *except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the taxpayer outside the Commonwealth* • • •."

Appellant would have us construe this to mean that sales attributable to Pennsylvania must be only those which are both *negotiated and effected* within the State, using "effected" in the sense of *consummated*, or *completed*. Such a construction would, of course, enable this appellant, or any foreign corporation, to eliminate the third allocative fraction from the tax formula by so arranging its sales machinery that all contracts would be "accepted," and therefore consummated, at the home office. This is clearly contrary to the intention of the legislature, which was that the gross receipts fraction should reflect that portion of *corporate activity* conducted in this State resulting in gross receipts to the corporation in the form of sales, rents and royalties. To assign to the word "effected" the meaning urged upon us by appellant would controvert and frustrate the legislative purpose. "Effected" has no technical meaning as a legal word of art. It is used in different senses, and often, loosely in contracts and statutes. Here, it is clear that it was intended to mean "accomplished" or "brought about": See Webster's New International Dictionary (unabridged). Given that meaning, it is consistent with the context and purpose of the section. The case of *Commonwealth* v. *Continental Rubber Works*, 347 Pa. 514, cited by appellant, supports this construction and opposes the construction for which appellant contends. There we held that sales negotiated by a branch sales office in New York, but *approved* and *accepted* in Pennsylvania, were assignable *outside* of Pennsylvania under Section 21 (b) above quoted. While it is true that the legislature excepted sales negotiated *or* effected outside of Pennsylvania, it is clear that it would not have intended the inclusion in the fraction of only those sales which were *both* negotiated and technically completed in this State, or by salesmen operating from agencies in this State.

Even if the Act were not so construed, it appears that many of appellant's sales were concluded in Pennsylvania. In the case of orders for bulk goods, for example, a written contract of sale was executed *in Pennsylvania* after approval of the home office in Chicago was obtained. Orders for packaged goods were received in the Pennsylvania offices and the sale was consummated there if no disapproval was received from Chicago within two days. Even if these sales are considered to be consummated in Chicago by an implied acceptance, appellant has not offered any proof of the segregated amount of such sales. The burden was upon it, on appeal to the court below from the resettlement of the tax, to show the error of the Commonwealth's computation.

Appellant's final argument is, that if Section 21 (b) is to be construed to include in the gross receipts formula sales consummated outside the Commonwealth or made in interstate commerce, that this tax violates the commerce clause of the Federal Constitution and imposes an unreasonable burden on interstate commerce. In this connection, appellant again conveniently overlooks the fact that the tax is imposed upon the privilege of doing business here, measured by capital stock. It is in no sense a tax on sales or on interstate transactions. Sales enter into the determination of the tax only as an index of business activity in this State. They are merely a factor in one of three allocative fractions designed to reflect such activity. There is no question, therefore, of taxing sales here or elsewhere. Appellant is not engaged in interstate commerce alone, and is not being taxed here for the privilege of doing an interstate business. The fact that its interstate business and its property in other jurisdictions enter into the computation of the tax because they affect the value of the Pennsylvania franchise does not make the tax, ipso facto, an unreasonable burden on interstate commerce in violation of the commerce clause. The burden imposed by the Act of 1935 is incidental and reasonable. As stated by Mr. Justice Stone, now Chief Justice, in *International Shoe Co.* v. *Shartel,* 279 U. S. 429: "A franchise tax imposed on

a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to *business done* or property owned *within* the state, is not invalid * * * because a part of the property or capital included in *computing* the tax is used by it in interstate commerce." See also *St. Louis S. W. Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290. And in *Southern Realty Corp.* v. *McCalum*, 65 F. (2d) 934, certiorari denied 290 U. S. 692, it was stated, "The origin, form, and location of that capital, whether in or out of the state, is unimportant, provided it is to contribute to the corporation's business power within the state * * * That a state may impose such a franchise or business privilege tax, and may measure it by the capital stock and surplus used by the corporation in its business, or by its income therefrom, although business is done in more states than one, without unconstitutional interference with interstate commerce or other Federal prerogative, and without a taxing of property beyond the jurisdiction of the taxing state, when the capital by which the tax is measured is reasonably apportioned according to the business there done, is settled by many decisions."

The judgment of the court below is affirmed; costs to be paid by appellant.

Certified a True Copy.

(S.) Helen W. Speck,
Deputy Prothonotary.

APPENDIX "C"

IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, MAY TERM 1943

No. 12

COMMONWEALTH OF PENNSYLVANIA

v.

FORD MOTOR COMPANY, *Appellant*

Appeal from Final Judgment of the Court of Common Pleas of Dauphin County in No. 416 Commonwealth Docket, 1939.

Opinion of the Court

Filed Jun. 30, 1944.

ALLEN M. STEARNE, *J.*

The appeal is from the judgment of the court below affirming the resettlement of a foreign corporation's franchise tax by the Department of Revenue.

The primary question involved is whether the formula enacted by the Act of May 16, 1935 P. L. 184, 72 PS 1901, amending the Act of June 1, 1889 P. L. 420, interpreted by this Court in *Columbia Gas and Electric Corp.*, 336 Pa. 209, 8 A. 2d 404, was correctly applied. The second question presented is whether, if correctly applied, the provisions of the Act are constitutional.

It will suffice preliminarily to state that the Act imposes a franchise or excise tax upon foreign corporations authorized to do business in this Commonwealth, in substitution for the property or ad valorem tax theretofore payable by such corporations. In the *Columbia Gas and Electric Corp.* case, supra, the history of the legislation is discussed and the constitutionality of the Act sustained. We decided, however, that assets of such foreign corporations which were not part of the working capital, and had no relation to the value of the business carried on in this Common-

wealth, should be excluded from the operation of the formula. See *Commonwealth* v. *The Mundy Corp.*, 346 Pa. 482, 30 A. 2d 878.

It is earnestly urged by appellant that the record reveals that there have been included in the application of the formula, tangible and intangible assets which are not part of its capital and which bear no relation to the value of the business carried on within this Commonwealth. In support of such contention we have been supplied with graphs, charts and mathematical demonstrations of almost astronomical proportions. We are therefore required to examine the facts in some detail to determine whether the statute has been correctly applied to them.

The Ford Motor Company is a corporation organized under the laws of Delaware. It is authorized by its charter to engage in a variety of business activities including the purchase, sale and holding of securities for investment or otherwise, the acquisition, management and operation of subsidiary corporations, the acquisition, ownership and granting of licenses under patents, mining, processing and dealing in coal, minerals, ores and metals, and the manufacture and sale of goods and merchandise of every description. Appellant's principal place of business is at Dearborn, Michigan. It has scattered throughout the United States a vast network of industrial and mercantile operations. It owns and operates mines of coal, iron, lead and garnet. It owns and operates quarries and timber tracts. Its manufactories produce pig iron, steel, castings, coke, benzol, gas and coal tar products. It has rolling mills, forges, die and tool shops, glass factories, paint plants, cement plants and saw mills. It operates a private railroad and a fleet of vessels plying the inland waters and the oceans.

In the State of Pennsylvania, in 1935, appellant owned and operated an assembly plant at Chester, where parts shipped from outside the State were used in the final step of manufacuring Ford automobiles. At Chester there was also a sales and service depot from which Ford automobiles and parts are sold at wholesale to dealers. At Pittsburgh there was a similar sales and service depot. In Philadelphia there was a building used for storage and the display of appellant's products. The Pennsylvania payroll of the cor-

poration for that year was in excess of $4,625,125, the book value of its tangible assets in this State was $7,196,685, and its gross receipts assignable to Pennsylvania operations were $45,927,254. These figures were reported by appellant to the Department of Revenue and used by the taxing authorities.

As a foreign corporation doing business in this State, appellant was authorized by its Certificate of Authority from the Commonwealth to engage here in the business of manufacturing and selling automobiles. For the privilege of doing this business, it was subject to the payment of an annual franchise tax under the Act of May 16, 1935, P. L. 184, 72 PS 1901, amending the Act of June 1, 1889, P. L. 420. Upon the basis of the company's report, the tax for 1935 was originally assessed at $106,499.91. Appellant petitioned for resettlement, and obtained a reduction of the tax to $88,470.92.

To comprehend appellant's contentions it is necessary first to refer to the purpose and operation of the Act of 1935. This Act imposes a *franchise* or *excise* tax upon foreign corporations, as distinguished from a property or ad valorem tax. Prior to 1935, foreign corporations doing business here were required to pay a capital stock tax, which, as a property tax, proved unsatisfactory and produced unfair results. As we stated in *Arrott's Estate*, 322 Pa. 367, 372, 185 A, 697, the Act of 1935, by changing the incidence of the foreign corporation tax, endeavored to achieve a more equitable measurement of taxation for this class of corporation. It accomplished this by imposing a franchise tax not *upon* capital stock but *measured* by capital stock. The tax base was determined, not by the allocation to Pennsylvania of an arbitrary percentage of the total capital stock of the corporation, but, through the use of a tripartite formula, by ascertaining, insofar as possible, the relation of the corporate activities in this State to the activities of the corporation everywhere. In the *Columbia Gas and Electric Corp.* case, supra, at page 216, we said: "The tax base represents the value of the right to do business in this State." This value, of course, is intangible, and incapable of *exact* computation, but, in

the *Columbia Gas and Electric Corp.* case, supra, we discussed the measurement of value devised by the legislature and sustained its reasonableness.

The Act of 1935 provided that the entire capital stock of a foreign corporation, as its proper valuation, should be divided into three equal parts. The resulting figure may be referred to, for convenience, as the multiplicand. This is first multiplied by the decimal fraction representing the ratio of tangible property in this State to tangible property of the corporation everywhere. It is then to be multiplied by a decimal fraction representing the ratio of wages paid by the corporation in this State to the total of its wage payments everywhere. Finally, it is multiplied by the decimal fraction representing the ratio of gross receipts assignable to Pennsylvania to gross receipts from all sources. The sum of these three multiplications is the tax base, representing the value of the Pennsylvania franchise, which is taxed at the rate of five mills.

In the *Columbia Gas and Electric Corp.* case, supra, we held that the tax, not being a property tax, but a tax upon the privilege of engaging in business in this Commonwealth, should be measured by a valuation reflecting capital so used as to affect the value of the Pennsylvania franchise, rather than a valuation reflecting merely aggregate capitalization. Many foreign corporations, like this appellant, are chartered to engage in a number of *unrelated* business activities or functions. Some of these diverse functions may have no relation to the business conducted in this State. We found that the Columbia Gas and Electric Corporation was engaged elsewhere in an extensive holding company business, which had no effect upon the operating business conducted by it in Pennsylvania, and, therefore, no effect upon the value of its Pennsylvania franchise. Consequently, we held that it was consistent with the legislative intention to exclude from the multiplicand of the statutory formula the value of so much of the capital stock of the corporation as was devoted to the holding company business. So reduced, the multiplicand merely reflected the value of the corporation's capital employed here, and elsewhere, in its operating function, since

only the employment of this capital was the value of the Pennsylvania franchise enhanced or affected.

A similar result was reached in *Commonwealth* v. *The Mundy Corp.*, supra. In that case, we directed the exclusion from the formula of the value of securities owned by the corporations, which had been purchased with shareholders' contributions and were retained solely for investment. We held that these assets were not part of the *working capital* of the corporation, and had no relation to the value of the business carried on by the corporation in this State.

Relying on these two decisions, appellant first contends that the determination of its 1935 tax is contrary to the established principles of operation of the Act of 1935. It asserts that its business is *multiform*, and that it conducts in Pennsylvania only two of four distinct corporate functions. It attempts to segregate these functions as follows: (1) the purchase and production of raw materials, (2) the manufacture of steel, glass, cement, paint, forgings, tools, dies, gauges, coke, benzol, and other products and byproducts of its raw materials, including finished automobile parts; (3) the assembly of finished automobiles, ready for sale, from pre-fabricated parts, and (4) the sale and servicing of the finished automobive products. Only the latter two functions are, it asserts, conducted in this State. Upon this premise, appellant maintains that all of the capital stock valuation representing capital employed in the first two functions should be withdrawn from the statutory formula. Thus, instead of using as the multiplicand one-third of $498,428,150, which the court below found to be the entire value of appellant's capital stock, appellant would substitute a multiplicand of one-third of $90,396,002, which it contends the value of that portion of the entire capital stock which is devoted to the last two functions above mentioned.

The fallacy of appellant's major premise is apparent. It appears to be extremely arbitrary to divide its manufacturing operation into three distinct and "unrelated" functions, segregating, for instance the function of assembly, which appellant concedes to be the last phase or final

step in the process of manufacture, from the first and intermediate phases. The chief difficulty with appellant's premise is, however, that it is completely contrary to the evidence presented and to the findings of fact of the court below, which, being supported by the record, must be given their customary conclusive effect.

The court below found that all of the capital stock of appellant was properly included in the measurement of its franchise tax, because it was all employed by the corporation in conducting a *unitary* enterprise. The entire capital of the Ford Motor Company is devoted to the manufacture and sale of its automotive products. There is an integral coordination of its various functions from the very inception of the manufacturing process to the sale and servicing of the finished products. The fact that these functions are many and varied does not require that they be regarded, for tax purposes, if not for practical purposes, as separate and unrelated enterprises. On the contrary, it appears that appellant has drawn them together into a cohesive economic unit. Because it finances its own purchases of raw materials, thereby reducing the cost, it must preserve large resources of working capital. It produces a large percentage of these materials at its own mines, quarries and timber lands. It maintains a private system of transportation for transporting the raw materials to its mills and factories. It processes them and manufactures them into parts for its trucks and automobiles. The parts fabricated by the company are shipped to assembly plants throughout the nation, similar to the plant at Chester, Pennsylvania, where the final step in the manufacturing process takes place. By means of these plants the company is enabled more conveniently, as its witness testified, to reduce the time and cost of distribution. In the assembly plants the parts are attached to the chassis, the body is welded, the upholstery is installed, the motor is assembled, the automobile is painted and equipped with tires and accessories. From Chester finished cars are shipped on order throughout Pennsylvania and many surrounding states. From the sale and servicing of the finished products the company derives its revenues.

This is the consummation of the *unified* operation. The whole of the corporate capital is devoted to the manufacture and sale of the finished products. The whole enterprise is like a vast assembly line, each part of which must operate in relation to the others and in harmony with them.

The fact that appellant's structure is vast and complex does not, as we have said, obscure its unitary nature. True, as appellant contends, one or more of the phases of its complete activity might have been separated from the others and conducted apart from them. The company could, for example, cease to produce its own raw products and purchase these materials from outside sources. It might have resorted to financial institutions for loans to purchase materials, thereby reducing its working capital. It might have ended the process of manufacture short of assembly, or, as appellant suggests, limited its activities to the assembly of automobiles from finished parts fabricated by other corporations. *It did, however, none of these things.* It has preferred to establish a great, cohesive empire of industry, through which it may control every phase and every step of the manufacture and sale of its products.

The tremendous advantage which has accrued to appellant by this integration of activities is manifest. The cost of the products in Pennsylvania has been affected by the economies possible in such a *unitary* structure. The demand for them has been affected by the goodwill of the large single enterprise, its centralized advertising possibilities, and its financial stability. Each one of the diversified activities of the corporation, representing together the full play of its enormous capitalization, bears directly or indirectly, and materially, upon the value of the Pennsylvania franchise. Obviously, the company cannot enjoy all of the practical advantages of an industrial unit, and, at the same time, attempt to deny for tax purposes the integration of the enterprise and the effect of that integration on its business activities in this State.

Our conclusion, and the conclusion of the court below, regarding the unity of appellant's enterprise is not novel. In *Ford Motor Company* v. *Clark*, 100 F. (2d) 515, it was held that this appellant is a *unitary* enterprise. The court states, at page 518: "*The Ford Motor Company has no*

business except the making and selling of cars.'' It is that business which appellant conducts in Pennsylvania. The decision last cited was affirmed by the Supreme Court of the United States in *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, in which Mr. Justice Reed said, at page 336; "In a *unitary* enterprise, property outside the state, when correlated in use with property within the state, *necessarily affects the worth of the privilege within the state.* Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine * * *. The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the *value of the privilege granted within the taxing state.''* See also *Ford Motor Co.* v. *Oklahoma Tax Commission*, 188 Okla. 78, 106 P. (2d) 803. Appellant's attempts to distinguish these cases do not detract from the conclusion therein that appellant's business is functionally *unitary*, and that its functional correlation affects materially the "value of the privilege granted within the state."

Appellant also urges that the court below and the Commonwealth erred in the application of the statutory formula by including in the multiplicand the book value of the stock of wholly-owned subsidiaries without including in the denominators of the allocative fractions the tangible property, wages and gross receipts of those subsidiaries. In effect, appellant would have us disregard entirely the entity of these corporations merely because the book value of their stock has been included in the assets of the corporation and is, therefore, reflected in the value of its own capital stock. The court below found as a fact that all of the assets of the appellant company, including such stocks, bonds, and other securities, are part of its working capital. As appellant does not carry the operating expenses and receipts of these corporations on its own books, and does not include them in its report of wages and receipts, there is no basis for their inclusion in the formula in law or in fact. That portion of appellant's capital invested in these stocks is no less a part of its working capital because the stocks are wholly owned by appellant. We therefore conclude

that the Act of 1935, as interpreted by us in the *Columbia Gas and Electric* and *Mundy* cases, has not been violated by the Commonwealth's application of the formula in determining appellant's tax.

There remain for our consideration appellant's several contentions that the tax imposed violates the Federal and State constitutions. It is argued that the formula for measuring the base of the tax results in depriving appellant of its property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution, and is contrary to Article I, Section 9, of the State Constitution. This conclusion is predicated upon the assumption that the tax is a tax upon property, and that it falls upon property beyond the jurisdiction of the Commonwealth to tax, in the form of tax-exempt securities of the United States and tangible and intangible property having its situs in other states. We held in the *Columbia Gas and Electric Corp.* case, supra, that this is a franchise tax and not a property tax. This discussion need not be repeated. Nor is it necessary to labor the point that a franchise tax may be *measured* by property which would not, itself, be amenable to a property tax. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165, it was said: "It is therefore well settled by the decisions of this Court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the *measure* of taxation is found in the income produced in part from property which of itself considered is nontaxable." See also *National Leather Co.* v. *Massachusetts*, 277 U. S. 413. And, in *Educational Films Corp.* v. *Ward*, 282 U. S. 379, at page 389, Mr. Justice Stone, now Chief Justice, stated: "* * * it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the *measure* of the tax, may chance to include the obligations of the other, or the income derived from them." Another case in point is *Philadelphia Contributionship* v. *Commonwealth*, 98 Pa. 48. As the reflection of the value of United States bonds owned by appellant in the measurement of the tax is not a tax upon

them, and is merely incidental to the operation of the formula, appellant's contention is not sound. The exclusion of the United States bonds from the measurement of the tax in the *Mundy* case, supra, was not upon constitutional grounds, but was directed because they did not form part of the working capital of the corporation taxed, and hence did not affect the value of the Pennsylvania franchise.

Appellant contends further, that, even if the tax in question is a franchise tax, the same sections of the Federal and State constitutions are violated by its imposition in the manner here approved, because the formula of measurement adopted by the legislature does not reasonably reflect the value of appellant's franchise, but results in an arbitrary allocation to this State of appellant's property in other jurisdictions. Appellant has endeavored to show, by estimates from its books, using its own "direct" method of allocation, and the "indirect method of allocation provided by the statutory formula, that the determination of its tax by the Commonwealth has this unconstitutional effect. Since this argument is based principally upon appellant's erroneous contention that it is a *multiform* enterprise, it requires nothing more than general discussion. Of appellant's "direct" method of determining the base for the franchise tax, it is sufficient to say that this method would not give proper weight in the value of the franchise to the advantages which it derives by its operation of a huge *unitary* enterprise. While we have conceded that an exact measurement of the value of a corporate franchise is impossible of attainment, we held in the *Columbia Gas and Electric Corp.* case, supra, that the method adopted by the legislature for this purpose in the Act of 1935 represented a reasonable and just attempt to determine that value. We there pointed out that the legislature had used in the formula three fractions which would reflect corporate activity in Pennsylvania in proper relation to the whole corporate activity. Chief Justice Kephart said, at page 220: "If the legislature had chosen to use a single one of these fractions and applied the same to the entire capital stock, certainly it could hardly be contended that it would be without its powers, provided proper consideration be given in each case to the elements to be included or omitted in

determining the value of the entire capital stock as the measure of the tax. The use of all three and the application of each to one-third of the entire capital stock value is simply an attempt to make the ultimate measure to which the tax is to be applied more representative of the actual worth of the franchise to do business and to allow the interplay of the factors to average out the hardship which might arise by reliance upon any single one."

Appellant's objection that there is no fraction representing the ratio of intangible property used in this state to intangible property everywhere, was also raised by the appellant in the *Columbia Gas and Electric Corp.* case, supra, and is adequately answered by the opinion. Clearly, the legislature is not bound to seek out and apply every possible permutation and combination of measurement that might have some bearing on the value of the franchise. In *Ford Motor Company* v. *Beauchamp,* supra, the United States Supreme Court sustained the formula of the Texas legislature which made the base of the franchise tax that proportion of capital stock, surplus and undivided profits, plus long term obligations, determined by the ratio of the gross receipts in the State to the total gross receipts of the corporation. This formula included only one of the three allocation fractions used in our statutory measure. In *Ford Motor Co.* v. *Oklahoma Tax Commission,* supra, the franchise tax formula of Oklahoma, also measured by capital stock, included only two of our three allocating fractions. See also *Southern Pacific Co.* v. *State Corporation Commission,* 41 N. M. 556, 72 P (2d) 15; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50; *International Shoe Co.* v. *Shartel,* 279 U. S. 429. The fact that the same allocating fractions are used in determining the base of the tax on net income of foreign corporations does not render them inappropriate for the determination of a franchise tax base measured by capital stock. Since they merely reflect *business activity* within the State they are equally appropriate to either determination. See *Butler Bros.* v. *McColgan,* 315 U. S. 501.

Appellant also contends that the Act of 1935, and the tax imposed upon it, violate the Fourteenth Amendment to the Federal Constitution by depriving it, and other foreign

corporations of the equal protection of the laws, and by discrimination in favor of domestic corporations. It is also maintained that Article IX, Section 1 of the Constitution of Pennsylvania, requiring taxes to be uniform upon the same class of subjects is violated. Despite the numerous authorities cited by appellant, it has failed utterly to sustain its charge of discrimination. Before the Act of 1935, both domestic and foreign corporations were subject to a capital stock tax. This was a tax upon *property*. Because of the unequal operation of the tax in the case of domestic and foreign corporations, the legislature adopted a franchise tax upon foreign corporations to achieve a greater degree of equality between the two classes. Equality of taxation does not require identical taxation. As we pointed out in the *Columbia Gas and Electric Corp.* case, supra, at page 227: "It is scarcely necessary to cite authorities that a state may differentiate in its method of taxing between foreign and domestic corporations." See *Kansas City &c. R. R. Co. v. Stiles,* 242 U. S. 111. Neither the Fourteenth Amendment nor Article IX, Section 1, of our Constitution, forbid classification justified by obvious differences in subjects of taxation. The incidence and base of taxation may be different in the case of foreign and domestic corporations. See *Pennsylvania Company, etc., Trustee, Case,* 345 Pa. 130, 135, 27 A. 2d 57.

The alleged discrimination in our tax laws against foreign corporations and in favor of domestic corporations is said to lie in the fact that domestic corporations enjoy certain exemptions in the computation of their tax base which are denied to foreign corporations. In this contention there is apparent again appellant's studied confusion of the essential differences between a property tax and a franchise tax. Certain property of domestic corporations, including United States obligations and tangible property having an extraterritorial location is excluded from the valuation of their capital stock for purposes of the direct tax. Obviously, this property could not constitutionally be included. Similar property, if owned by a foreign corporation and so employed by it as to affect the value of the franchise in Pennsylvania, is, on the other hand, included in the *measurement* of the base of the franchise tax. The

property itself is not taxed in the case of either domestic or foreign corporations. Such differences as result, result not from an intention of the legislature to discriminate against foreign corporations, but from the divergent natures of the taxes imposed on the two classes. See *Colgate v. Harvey*, 296 U. S. 404. The Commonwealth has demonstrated that a heavier tax burden falls more heavily on domestic corporations, by the capital stock tax, than falls upon foreign corporations subject to the payment of the franchise tax. In short, if appellant were a Pennsylvania corporation, it would pay more in capital stock taxes, utilizing the same property here, than it now pays in franchise taxes. While this demonstration does not afford an exact comparison (*Columbia Gas and Electric Corp.* case, page 159), it does lend strength to the Commonwealth's contention that there is a certain equivalence between the two forms of taxation despite the necessary differences in their application of which appellant complains.

The further contention of appellant that the statutory formula produces inequalities within the class of foreign corporations subject to the franchise tax is specious. Taking two hypothetical corporations, each of which is engaged in a *multiform*, rather than a unitary enterprise, it devotes an additional brief, replete with graphs, charts and mathematical assumptions, to proving that the corporation which, in this State, engages in a separate corporate function utilizing the greater amount of tangible property, would pay a higher tax, although both corporations, theoretically, had the same quantity of gross capital. If it were not for our decisions in the *Columbia Gas and Electric Corp.* and *Mundy* cases, supra, excluding from the measurement capital employed outside of the State in *unrelated* corporate functions. these interesting calculations might have some significance. It is sufficient to say, however, that neither of the hypothetical corporations would be taxed under the Act of 1935 by what appellant refers to as the "Commonwealth's Method", and that consequently, the inequality presumed by appellant would not arise. Appellant as a *unitary* enterprise, would not be affected, in any event, by the application of the formula in its suppositious cases.

Finally, appellant contends that the tax imposed by the Act of 1935 resulted in an impairment of its contract with the Commonwealth in violation of Article I, Section 10, of the Federal Constitution, and Article I, Section 17 of the Pennsylvania Constitution. This conclusion is predicated upon two assumptions; first, that the Commonwealth was obligated by a contract created by the legislature in Section 1010 of the Business Corporations Law of 1933, 15 PS 2852, to treat domestic and foreign corporations with equality in all matters, including taxation, and, second, that foreign corporations have not been so treated because of the substitution of the present franchise for the capital stock tax previously imposed upon them. Without discussing the first assumption, or considering whether the asserted contract was limited by implicit or explicit reservations of power to the Commonwealth to revoke or modify the authority granted a foreign corporation to do business here, we may dispose of this constitutional objection briefly by pointing out that appellant has failed to prove discrimination by the State against it, as a foreign corporation, in favor of domestic corporations. *Equality* of treatment does not, as we have heretofore stated, require or imply *identity* of treatment. It is not necessary to impose upon domestic and foreign corporations identical taxes by identical methods. An equivalent tax burden is imposed on both classes of corporations, which is a sufficient compliance with the contract appellant derives from the section of the business Corporation Law cited. We have examined most carefully the briefs in this case, and in a companion case, *Commonwealth v. The Quaker Oats Company* (opinion this day filed), including the brief of amici curiae., and have found in them no controlling authority contrary to our conclusion.

The judgment of the court below is affirmed; costs to be paid by appellant.

Certified A True Copy

(S.) Helen W. Speck,
Deputy Prothonotary.

APPENDIX "D"

IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

No. 53 May Term, 1939

COMMONWEALTH OF PENNSYLVANIA, Appellant,

v.

COLUMBIA GAS AND ELECTRIC CORPORATION

Appeal from Final Judgment of the Court of Common Pleas of Dauphin County

Opinion of the Court

KEPHART, C. J.:

On October 2, 1933, the Columbia Gas and Electric Company, a Delaware corporation, with its principal office in New York, applied for and obtained a certificate of authority to transact in Pennsylvania the business of "production of oil, gas and electricity and holding of real estate." From that date until October 31, 1935, it owned and operated in this State plants for the manufacture of gasoline and natural gas. In the conduct of that business for the year 1935 it employed tangible property of a book value of $331,813.39, paid wages of $14,926.27 and received from sales $31,451.47, all within or assignable to the State.

The company's corporate powers and businesses were broader than those which it qualified to pursue in Pennsylvania. The great bulk of its activities consisted in acting as a holding company. It owned 50% to 100% of the stock of some 50 subsidiaries, a substantial investment in stocks, bonds, mortgages and notes of other companies, and had a large amount of accounts receivable and cash. In 1935 the total value of these intangible assets amounted to approximately $446,000,000. The court below found that the legal situs of this intangible property was outside of this State.

Upon the withdrawal of the company from this State at the end of October, 1935, it filed a franchise tax report for 10 months, setting forth the following information:

Appraised value of entire capital stock	$188,862,501.00
Tangible property in Pennsylvania	331,813.00
Total tangible property	475,328.00
Wages paid in Pennsylvania	14,926.00
Total wages paid	453,612.00
Gross receipts assignable to Pennsylvania	31,451.00
Total gross receipts	18,257,245.00

The Commonwealth, pursuant to the amendatory Act of May 16, 1935, P. L. 184, settled the tax as follows:

Value of capital stock as appraised by Department of Revenue	$188,862,501.00
331,813.39 × ⅓ of 188,862.501 =	43,946.491.
475,328.86	
14,926.27 × ⅓ of 188,862.501 =	2,071.528.
453,612.37	
31,451.47 × ⅓ of 188,862.501 =	108,450.
18,257,245.78	
Taxable value of Capital Stock	46,126.469.
Tax of Five Mills	192,193.63
Penalty	.....
Amount due Commonwealth	192,193.63

An appeal was taken to the court below from this settlement of tax by the Revenue Department.

The taxing officials, from the argument presented in this Court, evidently based the settlement upon the assumption that the company was doing a holding company business in this State because of the following facts: The company had under lease several floors of the Union Trust Company Building in Pittsburgh at a rental of $80,000. per year,

which, in turn, was billed proportionately to the operating subsidiaries in Pennsylvania. The company had on deposit in the Union Trust Company from $1,300,000. to $1,400,000. From this account loans were made to its subsidiaries and repaid by them into it; into the account were received dividends of upwards of $658,000., and approximately $522,000., representing the proceeds of gas sold by appellee to another company.

However, the court below found that the executive business of the company was transacted, and all meetings of the stockholders and directors were held, out of the State; the stock certificates of subsidiaries, bonds, mortgages and other evidence of indebtedness were kept, and interest and dividends were received, outside of this State, except those sent for deposit to Pittsburgh, which were immediately entered upon the books of the New York City office. It concluded from this, as well as other evidence, that the company did not conduct a holding company business in this State. It then found that the amendment imposed a franchise tax on foreign corporations; that such tax measured by the capital stock was subject to constitutional restrictions imposed by the due process, equal protection and interstate commerce clauses of the Federal Constitution; that the allocation of taxable value to this State must bear a fair relation to the amount of local business done here by the foreign corporation; that, in this instance, the apportionment formula resulted in allocating a too large taxable value to Pennsylvania, principally because of the large amount of intangible properties which were located in another State and used solely in the performance of the holding company functions. The court concluded that the formula and allocation fractions prescribed by the statute to ascertain the taxable value of the franchise, operated not only unreasonably in the case of the Columbia Gas & Electric Company but were

> "* * * inherent in the method of allocation, and arbitrarily and unreasonably affect every corporation which has a substantial part of its intangible property outside of the State, because under the system pre-

> scribed by the Act intangible property is brought proportionately into the State for a base upon which to apply the tax."

It therefore declared the Act unconstitutional generally. From this decision the Commonwealth has appealed.

Prior to 1935 both domestic and foreign corporations were subject to the capital stock tax imposed by the Act of June 1, 1889, P. L. 420, as amended April 25, 1929, P. L. 657. Domestic corporations paid a tax of 5 mills on the whole amount of their capital stock less certain exemptions. Foreign corporations paid a tax at the same rate on that proportion of the value of their entire capital stock which the tangible assets within the State bore to all assets of the company.

The amendatory Act of May 16, 1935, P. L. 184, is entitled:

> "An Act to Further Amend * * * by substituting a Franchise Tax on Foreign Corporations in lieu of the Capital Stock Tax on such Corporations."

Section 21B of the Act provides:

> "Every foreign corporation * * * shall be subject to and pay * * * a franchise tax at the rate of 5 mills upon a taxable value to be determined in the following manner: The actual value of its whole capital stock of all kinds, including common, special and preferred shall be ascertained in the manner prescribed in the 20th Section of this Act and shall then be divided into three equal parts."

To each one-third of the value of this entire capital stock there are applied certain fractions, representative of the fundamental elements of corporate structure, that there may be determined the taxable value allocable to this State to which the tax rate is to be applied. In the first fraction the numerator is the value of tangible property within the State and the denominator is the value of the entire tangible property wherever situated. In the second fraction the numerator is the gross expenditure for wages, salaries, commissions, etcetera paid in this State and the denomi-

nator the wages, etcetera, of all employes everywhere. In the third fraction the numerator is the gross receipts from business assignable to the State and the denominator is the total gross receipts from all business. As above noted, each fraction is applied against one-third of the value of the capital stock. Their sum total represents the taxable value.

Prior to the Act of 1935 the tax imposed on capital stock of foreign corporations, as well as domestic, had been repeatedly held to be a property tax.[1] Guided by what was stated in *Commonwealth* v. *Standard Oil Company*, 101 Pa. 119, and *Commonwealth* v. *Curtis Publishing Co.*, 237 Pa. 333, it became the practice to tax only so much of the capital stock of a foreign corporation as the ratio of tangible assets in the State bore to all assets of the foreign corporation wherever situated. Under this arrangement foreign corporations, transacting a large part of their business here, escaped their fair share of the tax burden. The assets of foreign corporations, so far as they were comprised of intangibles, were wholly free of tax notwithstanding that they may have played an important part in the conduct of the company's local business. The old tax did not even reach all the tangible property of the enterprise located in this State. It made no attempt to value foreign corporations either as going concerns within this State, or as parts of going concerns which the foreign corporations had created through operations in this and other states. The discrimination under the old tax law was not only unfair, but operated unjustly in favor of foreign corporations, and against domestic corporations, even though they might be similarly situated. It is the old tax which appellee seeks to reestablish notwithstanding the fact that the capital stock tax imposed on domestic corporations both before and after 1935 taxes their intangibles, subject to certain exemptions.[2]

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[1] See *Com. v. Standard Oil Co.*, 101 Pa. 119; *Com. v. New York, Penna. and Ohio R. R. Co.*, 188 Pa. 169; *Dupuy v. Johns*, 261 Pa. 40; *Callery's Appeal*, 272 Pa. 255.

[2] See the Act of June 22, 1931, P. L. 687; *Com. v. Eastern Securities Co.*, 309 Pa. 44; *Com. v. Penna. R. R. Co.*, 297 Pa. 308; *Com. v. Shenango Furnace Co.*, 268 Pa. 283.

The legislature sought to remedy this condition by amending the law so that foreign corporations would pay substantially the same amount of tax as domestic corporations though the amount of the tax was arrived at by a different method. The new tax is more in keeping with the benefits received from this State. The tax base represents the value of their right to do business in this State.[3]

The discrimination which had existed in the tax treatment of foreign and domestic corporations might have been remedied by other methods, but it is not for the courts to determine the wisdom of the means chosen to accomplish a given equitable result. The legislature is the sole body to determine that question. It is only left to us to decide whether the system violates fundamental law.[4] Judge Hargest, of the court below, stated: "It (the franchise tax) is certainly a new tax and a new system of arriving at the taxable value;" The method does depart from the system or method heretofore existing of ascertaining the taxable value on which the tax is levied, but it cannot be condemned because it is new. Experimentation in taxation by the legislature is as lawful as experimentation in other fields.[5]

Did the legislature intend to change its old policy of levying a property tax and create in its stead a franchise tax upon foreign corporations? We concur with the court below in its conclusion that the tax is a franchise tax and

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[3] This court stated in *Arrott's Est.*, 322 Pa. 367, 372: "The reason for the change in the method of computation is clear. . . . The old method of measuring the capital stock of foreign corporations doing business in this Commonwealth was unsatisfactory and produced an unfair result. To reach a more equitable measurement of the base for these corporations, . . . the Legislature concluded that a different standard was necessary. This finds expression in the formula contained in the Franchise Tax Act which takes into consideration the ratio of tangible assets in use in this state to all other tangible assets, together with other factors such as payroll and gross receipts."

[4] *Com. ex rel. Kelly v. Clark*, 327 Pa. 181; *Com. ex rel. Kelly v. Cantrell*, 327 Pa. 369; *Rohrer v. Milk Control Bd.*, 322 Pa. 257; *Grim v. Weissenberg*, 57 Pa. 433; *Busser v. Snyder*, 282 Pa. 440.

[5] In *Newark Fire Insurance Co. v. State Board of Tax Appeals*, 59 Sup. Ct. 918, it is stated: "Wise tax policy is one thing; constitutional prohibition quite another. The task of devising a means for distributing the

not a property tax. The legislature in the title to the Act called it a franchise tax. While not conclusive, some weight should be given to this designation in determining the nature of the tax. See *Opinion of the Justices*, 250 Mass. 591, 148 N. E. 889; *San Francisco* v. *Liverpool*, 74 Calif., 113, 15 P. 380. Whether this is a property tax or a franchise tax rests to some extent upon the method of its ascertainment and the incidence of the tax itself. Where a tax is imposed directly on specific property it is a property tax. The incidence of a franchise or privilege tax is upon a franchise or privilege and not upon property or capital. It is true we stated in *Arrott's Estate*, 322 Pa. 367, that there was a close identity between the old capital stock tax [a property tax] and the new franchise tax. But we were there determining whether the owners of shares of stock in foreign corporations which pay taxes to this State should pay a personal property tax on these shares. Having discovered that it was the evident purpose of the legislature to have domestic corporations pay a capital stock tax of 5 mills and foreign corporations a tax of 5 mills on a taxable value, of which an underlying element is capital stock, we held that there was enough similarity between the methods of taxing foreign and domestic corporations to render exempt from personal property tax the shares of stock in foreign corporations, just as shares of stock in domestic corporations were exempt. The basic problem in that case was not the nature of the tax imposed on foreign corporations by the 1935 Act, but rather the problem of the exemption from personal property tax of the shares of stock in such foreign corporations.

Among the standards used for distinguishing a franchise tax from a property tax has been the method adopted

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burdens of taxation equitably has always challenged the wisdom of the wise financial statesman. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships with due regard to the promotion of enterprise and to the physical needs of different governments with which these relations are entwined, is peculiarly a phrase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts."

for laying them and fixing the amount.[6] It is true that under the Act of 1935 the value of the capital stock is used as an element, as provided in Section 20, but when this value is obtained the taxable value which is fixed by the apportionment method is not, nor can it be property in this State. In part, this is demonstrated by the considerations which enter into the valuation and appraisement of capital stock. Capital stock, as that term is employed in the Act, is a valuation of the corporation as a business enterprise, not an appraisement of bare worth of tangible and intangible properties. Section 20 of the Act makes it a reflection of the going-concern value of the entire organization. See *Commonwealth* v. *Delaware, Susquehanna & Schuylkill R. R.*, 165 Pa. 44, 48-49. The determination of the value of the franchise under the amendatory Act may bring into consideration property situated within the Commonwealth, and give to it a functional value as part of an organic unit. But the incidence of the tax is fixed upon the value of the franchise; not upon the property itself. To ascertain that taxable value there must, of course, be a method.

Under the 1935 Act, the underlying element in the ascertainment of the value of the franchise is the value of the entire capital stock of each foreign corporation. We referred to this in *Arrott's Estate*, 322 Pa. 367 as being the base. The attempt to determine what part of the value of this base should be the taxable value called for by the Act is to ascertain with approximate correctness the equivalence of that value which the legislature deemed the franchise or right to do business in this State to have.

Do the factors used in the income tax result in a fair method of determining the taxable measure which should be prescribed for the franchise to do business in this state?

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[6] It has been stated in *Com. v. Standard Oil Co.*, 101 Pa. 119: "The test, whether the tax in any given case is a franchise as distinguished from a property tax, would seem, from the authorities, to be that a tax according to a valuation is a tax on property, whereas a tax imposed according to nominal value, or measured by some standard of mere calculation—as contrasted with valuation-fixed by the law itself, may be a franchise tax." See also *Society for Savings v. Voite*, 6 Wall. (U. S.) 594.

Gross receipts necessarily indicate business done; they are derived from the use of intangibles as well as tangible assets. They are indicative of a going-concern value, which is inherent in the privilege of doing business in the Commonwealth. In applying against one-third of the value of the capital stock the ratio which the gross receipts within the State bear to the total gross receipts, the result must be to fairly proportion that part of the total taxable value which should be assigned to Pennsylvania. The Act considers the amount of tangible property in the State, compares it with all tangible property and applies it against the same base. Generally speaking, corporate business is transacted through the use of tangibles rather than intangibles. As the ratio of tangible assets in the State to tangibles situated everywhere varies so it may be said that the value of the corporate franchise within this state varies. Moreover, the intangible worth of a going corporation as well as intangible assets themselves may be said to have some degree of correlation as to situs with tangibles. It was undoubtedly within the power of the legislature to permit this correlation to be worked out through the use of a fraction which considered tangible assets only, leaving a more exact correspondence to be brought about through the interaction and effect of the other fractions composed of gross receipts and payrolls. The fraction composed of the ratio of payroll within this State to payroll everywhere is indicative of corporate activity within this State, whether in the form of manufacturing, selling or otherwise. As these activities increase within this State so it may be said the value of the right to do business in this State increases. If the legislature had chosen to use a single one of these fractions and applied the same to the entire capital stock, certainly it could hardly be contended that it would be without its powers,[7] provided

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[7] In *Roberts & Schaefer Co. v. Emmerson*, 271 U. S. 50, a franchise tax on that proportion of authorized capital stock represented *by business transacted and property* located within the state was upheld. In *International Shoe Co. v. Shartel*, 279 U. S. 429, a franchise tax imposed on foreign corporations on that part of their outstanding capital stock and surplus which the property and assets of the foreign corporation within

proper consideration be given in each case to the elements to be included or omitted in determining the value of the entire capital stock as the measure of the tax. The use of all three and the application of each to one-third of the entire capital stock value is simply an attempt to make the ultimate measure to which the tax is to be applied more representative of the actual worth of the franchise to do business and to allow the interplay of the factors to average out the hardship which might arise by reliance upon any single one.

The Act provides for the ascertainment of taxable value by a measure. In its process it applies allocating fractions to each foreign corporation's entire capital stock value. These fractions, as stated above, concern corporate activity. While they bear some relation to capital stock value, intrinsically they determine the taxable value of the corporate activity within this State rather than of the property located here. That it is the value of the franchise rather than the actual value of the property which is taken into account is clear from the factors which enter into the apportionment. They are the same which this Court considered in *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, where income was the fundamental base. It does not ascertain physical worth of assets located in this State, but arrives at a value which the functional or operating organic unit within this State possesses. It represents what the right to do business is worth. It must follow that the tax is not levied on property but on the franchise to do business measured by a taxable value secured through the ap-

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the state bore to all assets and property of the foreign corporation, wherever situated, was upheld. In *Hump Hair Pin Mfg. Co. v. Emmerson*, 254 U. S. 290, a tax on that proportion of the capital stock determined by averaging the percentage of the total business of the corporation transacted within the state and the percentage of the total tangible property located within this state was upheld. With respect to apportionment of income, there has been sustained an apportionment based upon tangible assets within a state to all tangibles wherever situated; See *Maxwell v. Kent-Coffey Mfg. Co.*, 291 U. S. 642; gross business within the state added to value of property within the state to total gross business and value of total gross assets. See *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321.

plication of the factors of gross receipts, tangibles and payrolls to the capital stock value. It is representative of the value of that very franchise.

Appellee contends that because a corporation's capital stock may be composed of intangible assets more or less of which may be used in connection with the business done in this State, the formula is inherently arbitrary because the factors do not take this element into consideration. In place of the fraction tangible assets in the State over all tangible assets of the corporation, it contends the fraction should be tangible and intangible assets within the State over entire tangible and intangible assets wherever situate. This argument would have much weight if the legislature were endeavoring to measure property within the State. Since, however, the tax is upon the value of a privilege, it is not necessary that there be an exact measurement of the intangibles within this state. In *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, the Court stated, "While a state cannot tax beyond its borders it may measure a tax within its authority by capital stock which in part represents property without the borders of the state". Moreover, as previously pointed out, there is embraced within the formula factors which bear relation to the intangibles.

In applying the formula set up by the legislature since the value of the capital stock is used as a measure, the taxable value of the franchise must have some relation to the business done in the taxing state. The Supreme Court of the United States in a number of cases has held that in fixing the taxable value with reference to property and business done within the state where capital stock is used as a measure, the property without the state may be taken into consideration only if it is an organic or functional part of that within the state. See *Fargo v. Hart*, 193 U. S. 490; *Wallace v. Hine*, 253 U. S. 66; *Norfolk & W. Ry. Co. v. State of North Carolina*, 297 U. S. 682. Where the intangibles are a necessary part of the corporate activity and are within the scheme of corporate functioning, actively or as reserve, there is no reason why they should not be included. If the intangibles acquire a business situs, they, of course

are properly included. See *Commonwealth v. Curtis Publishing Co.*, 237 Pa. 333; *Wheeling Steel Corp., v. Fox*, 298 U. S. 195. Viewing the Act as a whole it cannot be declared to violate either the Federal or State Constitutions or to be so inherently arbitrary as to render it unconstitutional.

It is contended, however, that even if the Act is structurally sound, as to appellee there is an unconstitutional application. An act may be constitutional structurally and yet not in its application to one or more corporations. It is almost impossible for any legislature to fix with certainty a tax measure which will work out equal and exact justice in every instance. But it would be subversive of all government for a court to arbitrarily invalidate an act of assembly because in its judgment the act might be invalid in one or more cases. As was stated in *Field v. Clark*, 143 U. S. 649, at pages 696-697:

> "a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government and produce the utmost confusion in the business of the entire country."

It is the duty of the courts to sustain the government's measure if it is at all possible to do so. This is plainly illustrated in our zoning laws which we held to be structurally constitutional, although in given instances they might work confiscation.

In *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, at page 430, we stated of the Corporate Net Income Tax Act and the formula prescribed in it:

> "The method or formula stands as the prima facie method of determining the net income. If, in particular cases, its operation will work an injustice or achieve an arbitrary result so far out of line with the actual facts as to cause it to be illegal, or if, in its application, it touches upon particular corporations, which, because

of their paramount federal interest, have been held to be immune from burdensome state taxation, then will be the time to consider such charges."

Appellee performs only a part of its functions within the state, and in connection therewith, employs a part of its tangible and some intangible property. Under the principles relating to corporations engaging in multiform business and considering that only part of appellee's business is conducted in Pennsylvania, as far as the capital stock value is related to tangible and intangible property, only such tangibles and intangibles should be taken into account as are concerned with the functions exercised within the state. The facts show under appellee's certificate it is permitted to and has actually limited its business to that of a manufacturing or operating company. The vast amount of its property consists of intangibles used in connection with its holding company business. The record does not disclose satisfactorily that it performs any part of that business within this State. Its power to act as a holding company is authorized under the laws of Delaware. It is obvious therefore that to include within the taxable measure all the property used in connection with this function would be to levy a franchise tax having no relation to the privilege granted by this State to appellee as an operating company or to any function actually performed herein. Analogies are not lacking to sustain this view that such action would violate constitutional privilege. In *Roberts & Schaefer Co. v. Emmerson*, 271 U. S. 50, the Court stated (page 54) of the holding in *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71 that a privilege tax could not be levied on authorized capital stock because

"The authority to issue its [the foreign corporation's] capital stock was a privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State."

See also *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412. In *Ozark Pipe Line Corp. v. Monier*, et al, 266 U. S. 555, the Court said (pages 566-567)

> "* * * so far as this case is concerned the *power to tax depends upon what was done and not upon what might have been done. Moreover, the license issued by the State authorized appellant to engage 'exclusively in the business of transporting crude petroleum by pipe line'.*"

In view of the fact that the legislature intended only to levy a tax on a measure fairly representative of the corporation's franchise to do business in this State, under the exceptional situation here presented, it is the duty of the Court to construe the Act so as to cause the statute's application to be both constitutional and fair.

Instances are not lacking in which courts have so construed statutes as to uphold them and yet avoid arbitrary results. See *People ex rel. Alpha Portland Cement Co.* 230 N. Y. 48; *People v. Knapp*, 129 N. E. 207; *Ratheman v. Western Union Telegraph Co.*, 127 U. S. 411; *Singer Sewing Machine Co. v. Brickel*, 233 U. S. 304; *Bowman v. Continental Oil Co.* 256 U. S. 642. In *Commonwealth v. Standard Oil Co.* 101 Pa. 119, where the Court had under consideration our previous capital stock tax act, in answer to an argument that the tax in effect brought within the tax base the entire capital stock of a foreign corporation, the Court stated:

> "we must construe them to mean so much of the capital stock measured by the property actually brought within the state by the company in the transaction of its business."

By these principles it is obvious that since the tax is nothing but one upon the value of a privilege and the taxable measure is fundamentally the capital stock used in connection with that privilege, we must for the purpose of determining the validity of the tax separate from it that capital stock value which bears no relation to the privilege. In determining the franchise tax to be levied on the Col-

umbia Gas and Electric Company, the value of its assets represented by capital stock used in connection with its holding company business should have been excluded by the taxing officials. In so holding it is to be understood that not all intangibles are to be disregarded for, to the extent that intangibles enter into the exercise of the franchise conferred by this state or privileges actually exercised within the state, such intangible value must properly be included. This redetermination of the tax due the Commonwealth will also require a readjustment in the figures prescribed in the statutory formula. For purposes of making the correct calculation of tax due, it will be essential that the separate phases of the business be determined not only with respect to capital stock values, but also with respect to computation of the statutory fractions.

There may be cases in which a foreign corporation pursues in this State, not merely one (as in the present case), but all the activities in which it engages in the state of its domicile, and nevertheless it may own assets, tangibles or intangibles, in its domiciliary state, which bear no fair relation to the value of the franchise enjoyed by the corporation in this State. In such cases such assets must be excluded from the value of the entire capital stock in determining the measure of the tax. Cf. *Hans Rees' Sons v. North Carolina*, 283 U. S. 123.

There are some further objections to the new Act's embodying part of the old Act and to the taking away of the exemption applicable to manufacturing corporations. These are very fully answered by the court below in holding that the tax was for the privilege of doing business in the Commonwealth and was not a property tax.

Appellee also contends that the act is invalid because it discriminates against foreign corporations in favor of domestic ones and therefore violates the equal protection clause of the Federal Constitution. It is sufficient answer to say that this is not a tax in addition to one already imposed, but a new tax which will bring foreign corporations up to the same plane of taxation as domestic corporations. It is scarcely necessary to cite authorities that a state may differentiate in its method of taxing between foreign and

domestic corporations. See *Concordia Fire Ins. Co. v. People of the State of Illinois*, 292 U. S. 535. If it attempted to impose a greater tax burden on foreign corporations than it did on domestic corporations similarly situated appellee would have a just cause of complaint.[8]

The result of the Act's operation is not so obviously wrong and so out of proportion to the business done and property within the State that it can be said to be confiscatory or discriminatory compared with similar domiciliary corporations. In the light of this opinion there is no imposition or unjust burden on this foreign corporation.

Another feature that has been called to our attention is that of unjust discrimination against foreign corporations as to the exemptions allowed domestic corporations. But the conclusion arrived at herein renders discussion of this argument unnecessary. The subject matter of the domestic corporation exemptions is the stock of subsidiaries. These no longer enter into the calculation of value of appellee's capital stock. This issue therefore disappears from the case.

Judgment reversed. The record is remitted to the court below with instructions that it be returned to the Department of Revenue to resettle the tax against appellee in accordance with this opinion.

---

[8] It was stated at the Bar of the Court that there were many hundreds of appeals under this Act. The Attorney General informed the Court that up to June 23, 1939, there were 7,780 foreign corporations liable to a franchise tax. During the operation of this statute there were upwards of 23,000 tax settlements made pursuant thereto and of this number there have been appealed to the Court 816. Of this latter figure there are but 306 appeals which raise the constitutionality of the Franchise Act. The remainder are factual disputes. In other words 3½% of the tax settlements have been appealed. There is only approximately 1½% on constitutional questions.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 873

THE QUAKER OATS COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

APPELLANT'S REPLY TO STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

W. A. Seifert,
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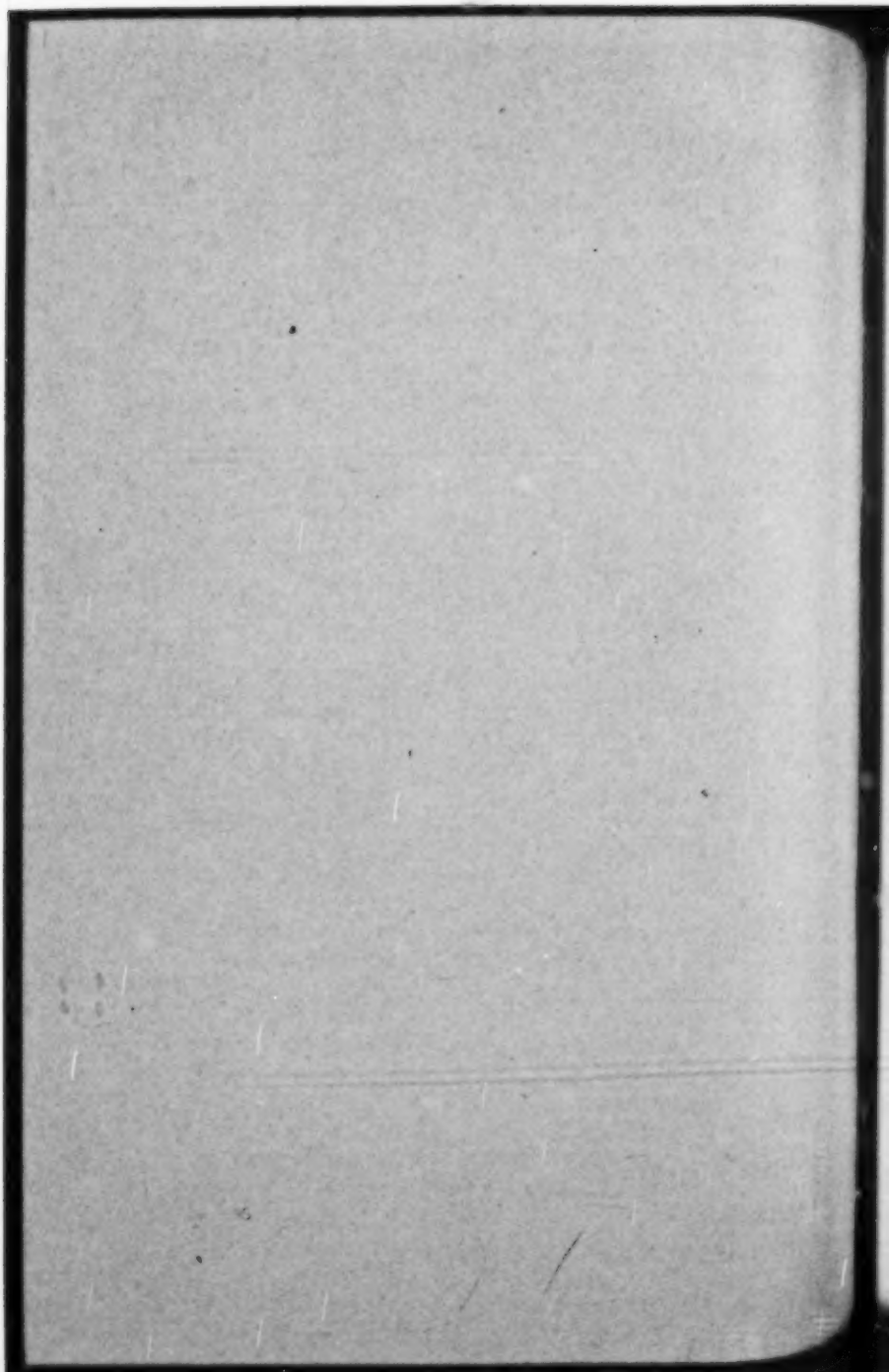

INDEX

Table of Contents

	Page
Preliminary Statement	1
Jurisdictional Question	2
The statute and the tax resettlement, the validity of which are involved	2
Counter-statement of the nature of appellant's business.	4
The federal questions presented are substantial, and have not been passed upon by this Court or have been decided contrary to appellee's contentions and the rulings thereon by the court below	6
(a) The Act of 1935 imposes on foreign corporations a tax upon their property and not a tax upon their privilege of doing business in Pennsylvania; and levies a tax upon appellant's property located and employed outside of the state	7
(b) The method of allocation provided in the Act of 1935 is inherently arbitrary and unreasonable.	15
(c) Even if the tax imposed by the Act of 1935 be a franchise tax, the method of allocation used results in imposing tax upon, or measuring the tax by, property of appellant located and employed outside of Pennsylvania	23
(d) The case of Ford Motor Company v. Beauchamp, 308 U. S. 331, is not applicable	32
(e) The Act of 1935 and the tax imposed on appellant thereunder deny to it the equal protection of the laws	33
(f) The Act of 1935 and the tax imposed on appellant thereunder impair the obligation of the contract between appellant and the Commonwealth	39
(g) The Act of 1935, as construed and applied in imposing tax on appellant, unduly and unlawfully burdens interstate commerce	43
Conclusion	47

Table of Cases Cited

Airway Corp. v. *Day*, 266 U. S. 71.....
American Smelting & Refining Co. v. *Colorado*, 204 U. S. 103.....
Arrott's Estate, 322 Pa. 367; 185 Atl. 697.....
Atlantic Refining Co. v. *Virginia*, 302 U. S. 22.....
Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68.....
Bass, Ratcliff & Gretton, Ltd. v. *Commission*, 266 U. S. 271.....
Butler Bros. v. *McColgan*, 315 U. S. 501.....
Callery's Appeal, 272 Pa. 255; 116 Atl. 222.....
Carpenter v. *Shaw*, 280 U. S. 363.....
Cheney Bros. Co. v. *Massachusetts*, 246 U. S. 147.....
Com. v. *Columbia Gas & Electric Corp.*, 336 Pa. 209; 8 A. (2d) 404.....10,
Com. v. *New York, Pennsylvania & Ohio R. R. Co.*, 188 Pa. 169; 41 Atl. 594 (1898).....
Com. v. *The Quaker Oats Co.*, 350 Pa. 253; 38 A. (2d) 325
Com. v. *Standard Oil Co.*, 101 Pa. 119 (1882).....
Com. v. *The Union Trust Co. of Pittsburgh*, 345 Pa. 298; 27 A. (2d) 15.....
Concordia Fire Insurance Co. v. *Illinois*, 292 U. S. 535..
Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77
Cream of Wheat Co. v. *Grand Forks*, 253 U. S. 325.....
Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.....
Cudahy Packing Co. v. *Minnesota*, 246 U. S. 450.....
Delaware, Lackawanna & Western R. R. Co. v. *Pennsylvania*, 198 U. S. 341..... 8,
Educational Films Corp. v. *Ward*, 282 U. S. 379, 387..
Fargo v. *Hart*, 193 U. S. 490.....
Ford Motor Co. v. *Beauchamp*, 308 U. S. 331 ...12,13,1

Ford Motor Co. v. *Oklahoma Tax Commission*, 188 Okla. 78, 106 P. (2d) 803.....18,
Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U. S. 412.....
Hammond Packing Co. v. *Arkansas*, 212 U. S. 322.....
Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494, 510, 511.....32,
Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290 ..31,

Page

International Shoe Co. v. *Shartel*, 279 U. S. 429..... 33,46
Irving Trust Co. v. *Day*, 314 U. S. 556..... 41
James v. *Dravo Contracting Co.*, 302 U. S. 134..... 27
Kansas City, Ft. Scott & Memphis Rwy. Co. v. *Botkin*, 240 U. S. 227..... 27,38
Kansas City, Memphis & Birmingham R. R. Co. v. *Stiles*, 242 U. S. 111..... 24,35
Kidd v. *Alabama*, 188 U. S. 730..... 35
Macallen Co. v. *Mass.*, 279 U. S. 620, 625, 626..... 10
Madden v. *Kentucky*, 309 U. S. 84..... 35
Maine v. *Grand Trunk Rwy. Co.*, 142 U. S. 217..... 46
Massachusetts v. *Western Union Telegraph Co.*, 141 U. S. 40..... 13
Matson Navigation Co. v. *State Board*, 297 U. S. 441..... 46
Maxwell v. *Kent-Coffey Mfg. Co.*, 204 N. C. 365, 168 S. E. 397, 400, 402; affirmed 291 U. S. 642..... 16
Memphis Gas Co. v. *Beeler*, 315 U. S. 649..... 43,45
National Leather Co. v. *Mass.*, 277 U. S. 413..... 24,30
Near v. *State of Minnesota*, 283 U. S. 697..... 10
Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359..... 10,43
Newark Fire Ins. Co. v. *State Board*, 307 U. S. 313..... 38
New York v. *Latrobe*, 279 U. S. 421..... 31
North American Cement Co. v. *Graves*, 299 U. S. 517..... 16
People, ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N. Y. 48; 129 N. E. 202, certiorari denied, 256 U. S. 702..... 17
Pullman Company v. *Richardson*, 261 U. S. 330..... 46
Pullman's Palace Car Co. v. *Pennsylvania*, 141 U. S. 18. 12
Roberts & Scheaffer Co. v. *Emmerson*, 271 U. S. 50..... 27,38
Schuylkill Trust Co. v. *Pennsylvania*, 296 U. S. 113, 119. 10
Society for Savings v. *Coite*, 73 U. S. (6 Wall.) 590..... 12,14
Southern Rwy. Co. v. *Greene*, 216 U. S. 400.....
Southern Realty Co. v. *McCallum*, 65 F. (2d) 934, certiorari denied 290 U. S. 692.....14,33,34
Turco Paint and Varnish Co. v. *Kalodner*, 320 Pa. 421, 184 Atl. 37..... 15,16
Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113..... 16,24
United States Glue Co. v. *Town of Oak Creek*, 247 U. S. 321..... 45

Page

Wallace v. *Hines*, 253 U. S. 66 18,27
Western Cartridge Co. v. *Emmerson*, 281 U. S. 511 46
Western Live Stock v. *Bureau*, 303 U. S. 250 45,46
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193 11,38

Table of Statutes Cited

Act of May 16, 1935, P. L. 184 (72 Purdon's Statutes, sections 1901, 1902, 1871, 1891, 1892a–1892d), which amended Sections 20 and 21 of the Act of June 1, 1889, P. L. 420. This Act is referred to elsewhere as the "Act of 1935" 3
Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes:
Section 2852 4,39
Section 2852–1010 39,40
Section 2852–1013 42
Act of June 1, 1889, P. L. 420, as amended by the Act of April 25, 1929, P. L. 657 4,7
Act of May 16, 1935, P. L. 208, 72 Purdon's Statutes, sections 3420–3420n 15,19,32,36
Bank and Corp. Franchise Tax Act of Calif., 2 Gen. L. Act. 8488, p. 3851, Stat. 1929, p. 19; amended, Stat. 1931, p. 2226; Stat. 1935, p. 965 20

Table of Other Authorities Cited

The Corporation Tax Service, California, Vol. 1, par. 5–804 20
Opinion Attorney General of California, No. 7467a, dated April 2, 1931 21
Article XVI, Section 10, Constitution of Pennsylvania. 41,42

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 873

THE QUAKER OATS COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

APPELLANT'S REPLY TO STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Preliminary Statement

Appellee, on January 5, 1945, filed with the Prothonotary of the Supreme Court of Pennsylvania a typewritten copy of its Statement Opposing Jurisdiction; and served same on appellant on January 8, 1945. Appellee, on January 15, 1945, served on appellant and filed with the Prothonotary of the Supreme Court of Pennsylvania a typewritten copy of its Motion to Dismiss the Appeal in the above case to this Court or to affirm the decision of the Supreme Court of Pennsylvania for the reasons advanced in its Statement Opposing Jurisdiction.

Jurisdictional Question

In determining whether it should take or note jurisdiction in this appeal to review the decision and judgment of the Supreme Court of Pennsylvania against appellant, the only question presented to this Court is whether the issues raised by appellant as set forth in its Statement As To Jurisdiction present substantial federal questions. Appellee contends that they do not because they have been settled by the decisions of this Court. Appellant contends that substantial federal questions are presented which have not been passed upon by this Court or have been decided by this Court, contrary to appellee's contentions and to the rulings thereon by the Supreme Court of Pennsylvania.

There is and could be no dispute by appellee that:

1. Appellant's application for the allowance of an appeal was timely.

2. This appeal is from a final judgment in a suit in the highest court of the State of Pennsylvania in which a decision in the suit could be had.

3. In this suit, there was drawn in question the validity of a statute of the Commonwealth of Pennsylvania and of the tax resettlement made thereunder against appellant on the ground of their being repugnant to the Constitution of the United States.

4. A decision on this question was necessary to the determination of the case.

5. The decision was in favor of their validity.

The Statute and the Tax Resettlement, the Validity of Which Are Involved

The statute of the Commonwealth of Pennsylvania which appellant contends is repugnant to the Constitution of the United States and under which the tax resettlement was

made against appellant for the year 1935, is the Act of May 16, 1935, P. L. 184 (72 Purdon's Statutes, sections 1901, 1902, 1871, 1891, 1892a-1892d) which amended Sections 20 and 21 of the Act of June 1, 1889, P. L. 420. See Appendix to Appellant's Statement as to Jurisdiction for verbatim language of the statute.

Under Section 20 of this statute the *whole* capital stock of appellant was appraised by the Pennsylvania taxing authorities at its actual cash value at December 31, 1935, to wit: $75,000,000. The trial court excluded from the whole valuation, the capital stock value of appellant's investment in the shares of stock of three inactive subsidiary corporations. The tax on appellant was computed under Section 21 (b) of said Act by dividing the remaining capital stock value into thirds and by applying against each third, separate allocation fractions of tangible property, wages and gross receipts. The final tax assessment on appellant, approved by the Supreme Court of Pennsylvania, was calculated as follows:

Tangible Property in Pennsylvania	—	22,440		
			=	.000895
Total tangible property		25,072,615		
Wages paid in Pennsylvania	—	143,259		
			=	.023060
Total wages paid		6,212,221		
Gross receipts in Pennsylvania	—	7,224,347		
			=	.109348
Total Gross Receipts		66,067,332		
				.133303
Average allocation percentage				.044434
Whole Capital Stock Valuation				$75,000,000
Less capital stock value of shares of three inactive subsidiaries having an asset value of $92,609.14				114,196
Capital stock value subject to allocation				$74,885,804
Taxable Valuation ($74,885,804 × .044434)				3,327,476
Tax at five mills				16,637.38

(R. 162a, 252a, 253a).

Counterstatement of the Nature of Appellant's Business

The Quaker Oats Company, appellant, was incorporated under the laws of New Jersey to manufacture and deal in cereals and cereal products, where it had its legal domicile (R. 175a). During the year 1935, it had its principal office and place of business at Chicago, Illinois, which was its business or commercial domicile (R. 183a).

It was duly registered and doing business as a foreign corporation in Pennsylvania prior to the enactment of the Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes, section 2852. As required by said Act, appellant applied for and received from the Commonwealth of Pennsylvania a Certificate of Authority authorizing it to transact as a foreign corporation in Pennsylvania, the business of "selling and dealing in cereals and cereal products" (R. 175a).

During the year 1935, appellant was engaged (1) in the purchase and storage of grains in grain elevators and (2) in the manufacture of cereals and cereal products, both carried on wholly outside of Pennsylvania (R. 177a, 219a), and (3) in selling and dealing in cereals and cereal products, carried on both within and without Pennsylvania (R. 177a, 219a). It also controlled and owned all, or a majority, of the shares of fifteen subsidiary companies, three of which were inactive during 1935, and none of which owned any property or transacted any business in Pennsylvania (R. 177a, 178a, 219a). It maintained a sales organization throughout the United States for the marketing of its products.

In Pennsylvania, appellant had two sales offices, one at Pittsburgh and the other at Philadelphia. At each location, a small inventory of goods was kept in a public warehouse to fill emergency orders. Salesmen connected with

these two offices obtained orders which gave rise to sales in the amount of $7,224,347 as follows:

From Pennsylvania stocks to Pennsylvania customers		$171,773
From stocks outside of Pennsylvannia to Pennsylvania customers	$5,341,783	
From mills outside of Pennsylvania to customers outside of Pennsylvania	1,710,781	7,052,564
Total (out of balance by $10) (R. 145a, 146a, 222a.)		$7,224,337

Except for sales of $171,773 made from Pennsylvania stocks to Pennsylvania customers, the remainder of the sales in the amount of $7,052,574 arising from orders obtained by the Pennsylvania sales offices, were controlled by, and approved or rejected at, appellant's home office in Chicago. There, the customers' credit was passed upon, their accounts were kept, *all invoices were made out except for sales from Pennsylvania stocks;* and shipments were made from stocks or from mills outside of Pennsylvania direct to the customer; and *remittances were made to Chicago* (R. 182a).

Appellant maintained two accounts in each of two banks in Pennsylvania. At each bank was maintained a small branch office expense account. The larger account at each bank *was maintained by collections at Chicago,* and was under the exclusive control of appellant's office there (R. 74a, 98a, 99a).

The total value of appellant's assets was $60,821,913, and the appraised value of its whole capital stock was $75,000,000, so that each dollar of asset value had a capital stock value of $1.23 (R. 179a). Among its total assets were the following:

Land, buildings, machinery and equipment located and employed wholly outside of Pennsylvania in purchasing and storage of grains, and in manufacturing cereals and cereal products (R. 177a, 218a)	$15,703,637.12

United States securities ($14,901,015.67) and State, County and Municipal securities ($1,117,545.39) located and employed wholly outside of Pennsylvania in purchasing and storage of grains (R. 178a, 218a)	16,018,561.06
Stocks of subsidiary corporations (R. 177a, 178a, 219a)	1,663,499.56
Accounts receivable and advances due from subsidiaries (R. 178a)	781,415.76

The amount of tangible property employed by appellant in selling its products in Pennsylvania, consisting of inventory stocks, automobiles and furniture and fixtures, was $22,440, which had a capital stock value of $27,668 (R. 179a, 180a). None of appellant's intangible assets had a business situs or commercial domicile in Pennsylvania (R. 183a).

Substantiality of Federal Questions

Appellant submits that the federal questions raised by it at various stages in this case, as set forth in its Statement As To Jurisdiction, are substantial, and have not been passed upon by this Court or have been decided contrary to the ruling of the court below. Appellee contends that this case presents no substantial federal questions or the questions are so unsubstantial as not to need further argument, and in support of its Motion to Dismiss or Affirm, assigns the reasons advanced in its Statement Opposing Jurisdiction. Appellant opposes the Motion to Dismiss or Affirm, and, in its Reply, will take up each question in the order discussed by appellee in its Statement Opposing Jurisdiction and will show that a substantial federal question is presented and that it has not been passed upon by this Court or has been decided contrary to the ruling of the court below.

(a)

Does the Act of 1935 impose on foreign corporations a tax upon the privilege of doing business in Pennsylvania or a tax upon their property?

It becomes important at the outset to ascertain what is meant by the term "capital stock" which is used in said Act of 1935 as the "measure" of the tax imposed on foreign corporations, and how the amount of such "measure" is determined.

Prior to the year 1935, both domestic corporations incorporated in Pennsylvania, and foreign corporations doing business in Pennsylvania, were subject to a tax upon the actual cash value of their whole capital stock, valued and appraised in the manner set forth in Section 20 of the Act of June 1, 1889, P. L. 420, as amended by the Act of April 25, 1929, P. L. 657. The Supreme Court of Pennsylvania held that the actual cash value of the capital stock of a corporation is a question of fact to be determined from the relevant facts in each particular case, that is, by considering the value of the tangible property of the corporation, and its assets of every kind, including its bonds, mortgages, and moneys at interest, and that it is proper to include in the appraisement of the value of the capital stock the value of the franchises and privileges enjoyed and exercised by the corporation, and to determine the value of these by the material results of their exercise.

Commonwealth v. *Standard Oil Co.*, 101 Pa. 119 (1882);
Commonwealth v. *New York, Pennsylvania & Ohio R. R. Co.*, 188 Pa. 169, 41 Atl. 594 (1898).

The Supreme Court of Pennsylvania and this Court have held that the valuation and appraisal of the capital stock of domestic and foreign corporations at its actual cash value as required under said Section 20 *represents all of*

the property and assets of the domestic or foreign corporation including franchises and privileges, no matter where located.

Commonwealth v. *Standard Oil Co.*, 101 Pa. 119 (1882);
Callery's Appeal, 272 Pa. 255, 116 Atl. 222;
Delaware, Lackawanna & Western R. R. Co. v. *Pennsylvania*, 198 U. S. 341.

In the *Delaware, Lackawanna & Western R. R. Co.*, case, *supra*, this Court said at pp. 356, 357 and 358:

> "• • • We regard this tax as in substance and fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the state which thus assumes to tax it. • • •
>
> "So, if the State cannot tax tangible property permanently outside the State and having no situs within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State.
>
> "• • • We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, eo nomine, or specifically, when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock or something else, which represents that property. Such a tax, in its nature, by

whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock."

This Court, therefore, has construed the nature of the tax imposed upon the capital stock of foreign corporations prior to 1935, and held it to be a tax on property. Appellant contends that the nature of the tax remains the same under the Act of 1935.

The said Act of 1935, which amended Sections 20 and 21 of the Act of 1889, continued in Section 21(a) the tax on the capital stock of domestic corporations as theretofore, and in Section 21(b), imposed tax on "the taxable value" of the capital stock of foreign corporations to be determined by the formula provided therein. The basis of the tax on both domestic and foreign corporations *continued to be the appraised actual value in cash of the whole capital stock as provided in Section 20 which remained unchanged.* Therefore, the term "capital stock" when used in the Act of 1935 as the "measure" of the tax on foreign corporations means and represents the same things as theretofore. Section 21(c), which provides that domestic and foreign corporations liable to tax under Section 21 "shall not be required to pay any *further* tax on the mortgages, bonds, and other securities owned by them * * *," is indicative that the tax imposed on foreign corporations under Section 21(b) still remains a tax on property.

Furthermore, no mention is made in Section 21(b) of the Act of 1935 or elsewhere that the tax imposed on foreign corporations is a tax on the privilege of doing business in Pennsylvania. The only reference in said Act to a franchise tax is in the title thereof where it is stated that there is being substituted "a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations." Appellant submits that the tax imposed on the

property of foreign corporations prior to 1935 cannot be converted by the Act of 1935 into a privilege tax merely by *calling* it such, when the same "measure" of the tax with all its characteristics and incidents is retained and the only change is in the method provided for the allocation of the "measure."

The issue as to the nature of the tax imposed on foreign corporations by the Act of 1935 has not been passed upon by this Court. Even though the Supreme Court of Pennsylvania in its opinion in the instant case, 350 Pa. 253, 38 A. (2d) 325, and in the case of *Commonwealth* v. *Columbia Gas & Electric Corporation,* 336 Pa. 209, 8 A. (2d) 404, has held that the said tax is a tax on foreign corporations for the privilege of doing business in Pennsylvania and not a tax on their property, it is well settled that this Court is not bound by the characterization given a state tax by state courts and Legislatures or relieved from the duty of considering the real nature of the tax from its operations and incidents.

Carpenter v. *Shaw,* 280 U. S. 363;
Near v. *State of Minnesota,* 283 U. S. 697;
Educational Films Corp. v. *Ward,* 282 U. S. 379, 387;
The Macallen Co. v. *Mass.,* 279 U. S. 620, 625, 626;
Schuylkill Trust Co. v. *Pennsylvania,* 296 U. S. 113, 119;
Nelson v. *Sears, Roebuck & Co.,* 312 U. S. 359.

And this is particularly so where the opinions of the Supreme Court of Pennsylvania are inconsistent as to the nature of the tax. In *Arrott's Estate,* 322 Pa. 367, 185 Atl. 697, and in *Commonwealth* v. *The Union Trust Company of Pittsburgh,* 345 Pa. 298, 27 A. (2d) 15, it was held that the tax on foreign corporations under the Act of 1935 is in effect "a tax on capital stock" and that "the property included within the folds of the Franchise Tax embraces

the same elements upon which the capital stock tax was based."

The issue as to the nature of the tax presents a substantial federal question. It is a fundamental principle that a tax on property must be imposed according to the value and location of the property. This Court said in *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, at p. 208:

> "We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state."

In the instant case, the trial court found that none of appellant's intangible assets had acquired a business situs or commercial domicile in Pennsylvania (R. 183a) and the asset value of appellant's tangible property in Pennsylvania was only $22,440 (R. 179a, 180a, 183a) and yet the taxable value of appellant's franchise as determined is $3,327,476. Clearly, therefore, if the tax imposed on appellant under the Act of 1935 is a tax on its property, the tax is laid on its property outside of Pennsylvania, in violation of the due process provisions of the Fourteenth Amendment.

Appellee in its Statement Opposing Jurisdiction does not contend that this Court has passed upon the issue as to the nature of the tax or that the issue does not present a substantial federal question. It contends that the tax imposed on foreign corporations by the Act of 1935 is a tax on the privilege of doing business and not a tax on property, and advances in support thereof, two propositions:

1. The Supreme Court of Pennsylvania, in its opinions in the instant case and in the case of *Commonwealth* v. *Columbia Gas & Electric Corporation,* 336 Pa. 209, 8 A. (2d) 404, has held that the tax is on the privilege of doing business and not on property.

2. Although conceding that the "measure" of the tax is the value of capital stock representing property value, it is asserted that when the average of the three allocation fractions, (the tangible property fraction, representing property value; and the wages and receipts fractions, representing business activities, and not property value), is applied to the value of the capital stock, the resulting product is not property value but a composite figure representing the value of the privilege of doing business in Pennsylvania. The cases of *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, and *Society For Savings* v. *Coite*, 73 U. S. (6 Wall.) 590, are cited as authorities for this proposition.

As to the first proposition, we have already pointed out that this Court is not bound by the characterization given a state tax by state courts and Legislatures, and is not relieved from the duty of determining the real nature of the tax from its operations and incidents.

As to the second proposition, there is no authority or foundation for the conclusion reached. Appellant submits that whatever the "measure" of the tax that is used, the result produced by a method of allocation of the "measure" retains the same characteristics as the "measure" because the allocation merely accomplishes a distribution of the "measure" within and without the taxing state. Under the Act of 1889, when capital stock value was the "measure" of the tax on foreign corporations and a mileage fraction was used to allocate the "measure", the result was still capital stock value and a tax thereon was a property tax as this Court held in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18. In this case, the miles of track of the railroad companies over which the cars of the Pullman Palace Car Company ran did not represent "value" any more than did the wages and gross receipts allocation factors in the instant case. Likewise, this Court held that

the result was property value when in the case of *Massachusetts* v. *Western Union Telegraph Co.*, 141 U. S. 40, the whole value of the capital stock of a telegraph company was allocated by the ratio of the length of telegraph lines in the state to length of lines everywhere.

The ascertainment of the nature of the tax imposed by the Act of 1935 on foreign corporations does not depend, as contended by appellee, upon the transmutation of the "measure" by means of allocation factors into a tax base wholly different in character from that of the "measure." Under the Act of 1935, the "measure" of the tax is the appraised actual cash value of the whole capital stock representing property and asset values; and, appellant submits that the base of the tax represents the same thing no matter what allocation factors are used.

The problem as to the nature of the tax must be resolved by keeping in mind the real nature of the "measure" and the fact that the Act of 1935 is an amendment to Sections 20 and 21 of the Act of 1889 which imposed a property tax on both domestic and foreign corporations; and then determining whether the Act of 1935, which continues the property tax on domestic corporations, does in terms impose a tax on foreign corporations for the privilege of doing business in Pennsylvania, or whether the real nature of the tax from its operations and incidents remains unchanged as a tax on the property of foreign corporations. Appellant submits that this Court should take or note jurisdiction to determine this issue.

The two cases cited by the appellee are not decisive of the issue as to the nature of the tax in the instant case. In the case of *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, the nature of the tax imposed by the Texas statute was not at issue. There, the taxing statute, which was not an amendment to a property tax statute, by its terms, operations and

incidents imposed a franchise tax, payable in advance, *on both domestic and foreign corporations* for a limited license to do business in Texas for one year. The tax was imposed directly by the Legislature and did not require any valuation. Under the Pennsylvania Act of 1935, the tax is not imposed directly by the Legislature. An appraisal of the "measure" and an assessment of the tax must be made. The measure of the Texas tax, to wit, capital stock, surplus and undivided profits plus long term indebtedness *as shown by the books of the corporation*, does not relate, as does the measure of the tax under the Act of 1935, to the actual value of property and assets; it does not include the value of franchises, privileges and good will, or going concern value; and it does not represent the actual amount or value of capital stock. In the case of *Southern Realty Co.* v. *McCallum*, 65 F. (2d) 934, certiorari denied *290 U. S. 692*, the lower court, speaking of the Texas statute, said at p. 936:

> "But some of the complainants have been unsuccessful and have lost the capital originally represented by their bonds or by their capital stock. Yet the law, *providing for no deduction of a deficit*, measures their tax as though the loss had not occurred." (Italics ours.)

The tax imposed by the Connecticut statute in the second case cited by appellee, to wit, *Society For Savings* v. *Coite*, 73 U. S. (6 Wall.) 590, is not analogous to the tax imposed by the Pennsylvania Act of 1935. There the tax was levied directly by the Legislature in a sum equal to three-fourths of one per cent. on the total amount of deposits of the savings institution as of July 1. Objection was taken to the tax on the ground that it was imposed upon United States securities in which the deposits were invested. This Court sustained the tax as a franchise tax and not a tax on property since it found that no appraisal, either of the investments

or of the value of the deposits, was required. We have shown heretofore that under Section 20 of the Act of 1935, the amount of the measure of the tax, to wit, the actual cash value of the whole capital stock, is determined by an appraisal and valuation of all property and assets including bonds, mortgages, moneys at interest, franchises, privileges and good will. It would appear, therefore, that the *Coite* case is authority for appellant's contention that the tax imposed by the Act of 1935 is a tax on property *since an appraisal and valuation of property and assets is required.*

This Court's attention is called to the fact that Pennsylvania did impose for the year 1935 another and a different tax *on domestic and foreign corporations for the privilege of doing business in Pennsylvania* measured by net income arising from business activities. See the Act of May 16, 1935, P. L. 208, 72 Purdon's Statutes, sections 3420a-3420n, and the case of *Turco Paint and Varnish Co.* v. *Kalodner*, 320 Pa. 421, 184 Atl. 37. In the instant case, the "measure" of the tax is made up of property and asset value.

(b)

Is the method of allocation provided in the Act of 1935 inherently arbitrary and unreasonable?

This issue presents a substantial federal question under the due process clause and has not been passed upon by this Court, nor do its decisions have direct application.

Regardless of whether the tax imposed by the Act of 1935 on foreign corporations be a tax on the privilege of doing business or a tax on their property, appellant contends that the method of allocation provided in said Act for the allocation of the "measure" of the tax—consisting, as it does, wholly of property and asset values—is

inherently arbitrary and unreasonable for the following reasons:

1. The allocation factors of tangible property, wages and gross receipts, which are used in the method of allocation, have been held "to reflect the relative contribution of the activities in the various states to the production of the unitary *income*" of a corporation:

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113;

Bass, Ratcliff & Gretton, Ltd., v. *Commission*, 266 U. S. 271;

North American Cement Co. v. *Graves*, 299 U. S. 517;

Butler Bros. v. *McColgan*, 315 U. S. 501;

Turco Paint and Varnish Co. v. *Kalodner*, 320 Pa. 421, 184 Atl. 37.

and are not appropriate for the allocation of capital stock value made up of *property and asset values*. When such a "measure" of the tax is selected, the allocation factors must vary within and without the state, in substantially the same proportion as the selected "measure" varies. That the allocation factors used in the Act of 1935 do not meet this test is conceded by appellee when it says on page 7 of its Statement Opposing Jurisdiction:

> "While the three fractions are applied to the value of the capital stock, two of the three fractions do not depend at all upon property or the amount thereof."

See also *Maxwell* v. *Kent-Coffey Manufacturing Co.*, 204 N. C. 365, 168 S. E. 397, 400, 402, affirmed 291 U. S. 642.

2. The method of allocation is defective in that no representation is given therein to appellant's intangible assets which comprise 58% of its total assets and all of which are located and used outside of Pennsylvania (R. 183a).

The case of *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48, 129 N. E. 202, certiorari denied, 256 U. S. 702, supports this proposition. There was involved in that case a New York statute which provided for the apportionment of the business income of a corporation, including dividends and interest, by a formula which failed to include the value of interest bearing bonds and 90% of the value of dividend paying stocks. Concerning the formula, the late Mr. Justice Cardozo, then on the bench of the Court of Appeals of New York, speaking for the court, said at p. 206 (129 N. E.):

> "It measures the value of the franchise, here and elsewhere, by income from all sources, and excludes some of the same sources when the value is apportioned. To take from the assets elsewhere is equivalent to adding to assets here. * * * The principle of allocation is not followed to its natural and obvious outcome in accordance with the situs of the assets, but is consciously checked, its normal course is thwarted by an artificial and designed exception. Something which, in the absence of express exclusion, would be within its operation, is knowingly taken out of it. I am unable to avoid the conclusion that a method of apportionment which purposely ignores realities, which compels an assessor to look to some of the assets only, and close his eyes to all of the others, is arbitrary and unreasonable in its increase of the local burden."

3. The method of allocation, when applied to the actual value of appellant's whole capital stock, does not determine the true value of its capital and property employed in Pennsylvania but arbitrarily allocates to Pennsylvania, as the base of the tax, the capital stock value of all of its assets, both tangible and intangible, regardless of their

location, situs or use, to the extent of the average percentage of the allocation fractions in Pennsylvania.

Wallace v. *Hines,* 253 U. S. 66;
Fargo v. *Hart,* 193 U. S. 490.

Appellee, on the other hand, contends that the method of allocation provided in the Act of 1935 is not arbitrary or unreasonable, and advances in support thereof three propositions:

1. That the case of *Butler Bros.* v. *McColgan,* 315 U. S. 501, is controlling in the instant case because in that case allocation factors of tangible property, payroll and receipts, which were similar to those provided in the Pennsylvania Act of 1935, were approved as appropriate "ingredients of an apportionment formula."

2. That the ruling in the *Butler* case, *supra,* is directly contrary to the ruling in the case of *People ex rel. Alpha Portland Cement Co.* v. *Knapp, supra,* cited by appellant.

3. That no distinction can be made between the use of the allocation factors as provided in the Act of 1935 in the allocation of net income and their use in the allocation of capital stock, because the use of similar allocation factors in the allocation of capital stock has been approved in *Ford Motor Company* v. *Beauchamp,* 308 U. S. 331, and in *Ford Motor Company* v. *Oklahoma Tax Commission,* 188 Okla. 78, 106 Pac. (2d) 803.

As to the first proposition, appellant submits that the *Butler* case, *supra,* is not controlling in the instant case on the issue as to the arbitrariness of the method of allocation. In that case, *net income* was the "measure" of the tax. With reference to the use of the allocation fac-

tors of tangible property, payroll, and receipts, Mr. Justice Douglas speaking for this Court said at p. 509:

> "We agree with the Supreme Court of California that these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income' so as to allocate to California its just proportion of the profits earned by appellant from this unitary business."

Appellant concedes that these allocation factors are appropriate for the allocation of the *principal business income* of a manufacturing corporation for the reasons stated by Mr. Justice Douglas. It has not questioned the settlement of tax on its *net income* for 1935, which was imposed by the Pennsylvania Act of May 16, 1935, P. L. 208, 72 Purdon's Statutes, sections 3420a-3420n, in which these factors were used for the allocation of *net income.*

In the instant case, the "measure" of the tax is the actual cash value of appellant's whole capital stock. As shown heretofore, the only factors contributing to capital stock value, as used in the Act of 1935, are property and asset values. On the authority of the *Butler* case, allocation factors which are representative of and contribute to capital stock value should be used in the Act of 1935. On page 12 of its Statement Opposing Jurisdiction, *appellee concedes that this has not been done* when it says:

> "The state makes no presumption * * *, 'that capital or property is employed in the same ratio as business activities.' The purpose of the Pennsylvania statute in employing the wages fraction and the gross receipts fraction in the formula, is to measure business activity to an extent that property might not do it, in order to obtain a fairer valuation of the privilege or franchise to be taxed."

Since appellee concedes that the allocation factors as provided in the Act of 1935 are representative of business activities, and that capital or property, which constitute the "measure" in the instant case, is *not* employed in the same ratio as business activities, it follows that too little or too much of the "measure" is allocated to Pennsylvania as the basis of the tax; and for this reason appellant submits that the method of allocation is inherently arbitrary and unreasonable.

As to the second proposition, appellant submits that the ruling in the *Knapp* case, supra, is not contrary to the ruling in the *Butler* case, supra; and that therefore the *Knapp* case is authority for appellant's proposition that the method of allocation as provided in the Act of 1935 is inherently arbitrary and unreasonable because no representation is given therein to appellant's intangibles which comprise 58% of its total assets and capital stock value.

The *Butler* case involved the Bank and Corporation Franchise Tax Act of California. 2 Gen. L., Act 8488, p. 3851; Stat. 1929, p. 19; amended, Stat. 1931, p. 2226; Stat. 1935, p. 965. The 1931 amendment provided that income from intangible personal property, except dividends, upon which the tax had been paid by the declaring corporation, shall be subject to allocation. This amendment was repealed by Ch. 275 of the Laws of 1935.

On December 4, 1936, a Regulation was adopted by the State Board of Equalization (See The Corporation Tax Service, California, Vol. 1, paragraph 5-804) which provided that:

> "In the case of corporations organized under the laws of the state and foreign corporations *which have acquired a commercial domicile within the state,* the measure of the tax * * *", (Underscoring Ours)

shall include income from intangible personal property, except dividends upon which tax has been paid by the declaring corporation; and that,

> "In the case of other corporations, income from intangible personal property is included in the measure of the tax only if the intangibles have acquired a business or taxable situs in this state"

The opinion of the Attorney General of California, No. 7467a, dated April 2, 1931, is substantially to the same effect.

In the *Butler* case, an Illinois corporation was involved and the "measure" of the tax was net income. There was no evidence in the record that it had acquired a commerical domicile in California, or that any of its intangibles had acquired a business situs there; but even if these conditions had existed, the *whole* of the income from intangibles would have been assigned, under the Regulation referred to above, to California without the use of any allocation factors. In that case, therefore, the allocation factors, similar to those in the Pennsylvania Act of 1935, were applied to allocate only the principal business income, that is, the income from buying and selling merchandise, *not including* income from intangibles. Accordingly, the ruling of this Court upholding the use of the allocation factors in the *Butler* case is not contrary to the ruling in the *Knapp* case which held that the method of allocation there involved was arbitrary and unreasonable unless representation be given therein to the intangible asset values producing the net income to be allocated or unless the income from intangibles be excluded from the net income to be allocated. Accordingly, in the latter case, bond interest was eliminated from net income, and stock values were added to the asset values without the state in the allocation formula.

Appellant submits that both of these cases support its proposition that the method of allocation as provided in the Act of 1935 is inherently arbitrary and unreasonable because no representation is given therein to appellant's intangible assets which comprise 58% of its total assets and capital stock value.

As to the third proposition, the fact that the use of allocation factors similar to those provided in the Act of 1935 have been approved in the allocation of capital stock in cases arising under the franchise tax statutes of other states, is not controlling in the instant case, as contended by the appellee. The two cases cited by the appellee are *Ford Motor Company* v. *Beauchamp,* 308 U. S. 331, and *Ford Motor Company* v. *Oklahoma,* 188 Okla. 78; 106 P. 2d 803. The latter relied wholly upon the former. Differences in the Pennsylvania and Texas statutes in the nature of the tax, the "measure" of the tax, the time of the imposition of the tax, and the purpose for which the tax is imposed, refute appellee's contention. These differences are detailed at pages 19 and 20 of appellant's Statement As to Jurisdiction.

Furthemore, in the Oklahoma case, the asset allocation ratio includes all assets, both tangible and intangible, and, in both cases, the gross receipts allocation ratio in the taxing state is limited to wholly intrastate business only, whereas, in the instant case, a tangible property allocation ratio is used and the gross receipts fraction includes interstate receipts.

(c)

Even if the tax imposed by the Act of 1935 be a franchise tax, does the method of allocation used result in imposing tax upon, or measuring the tax by, property of appellant located and employed outside of Pennsylvania?

This issue presents a substantial federal question under the due process clause and has not been passed upon by this Court.

The trial court in the instant case found that none of appellant's intangible assets had acquired a business situs in Pennsylvania (R. 183a); that appellant had not acquired a commercial domicile in Pennsylvania (R. 183a); that each asset dollar had a capital stock value of $1.23 (R. 179a) or an enhanced value of 23¢; and that the appellant had tangible property employed in Pennsylvania in the amount of $22,440 (R. 179a, 180a) which had a capital stock value of $27,668 ($22,440 x $1.23). These findings of the trial court were not overruled by the Supreme Court of Pennsylvania in its opinion in the instant case.

Appellant contends that, when, in the face of these findings by the trial court, the taxable value of appellant's franchise is determined to be $3,327,476, the result is the imposition of tax upon appellant's property located and employed outside of Pennsylvania. This is caused by the application of the three allocation factors to appellant's whole capital stock value (with a minor exception) regardless of the location, situs or use of its assets. This showing is proof by appellant of the taxation of extraterritorial values even though the use of similar allocation factors has been approved in cases arising under the franchise tax statutes of other states.

Appellee contends that neither the Act of 1935 nor the method of allocation used in this case imposes a tax upon

property located outside of Pennsylvania, and advances in support thereof three propositions:

1. That the Supreme Court of Pennsylvania has held that the Act of 1935 does not impose a tax upon property whose situs is beyond the limits of the State, citing *Commonwealth* v. *Columbia Gas & Electric Corporation,* 336 Pa. 209, 8 A. (2d) 404.

2. That this Court has frequently held that while a state may not tax property beyond its borders, it may measure a tax by capital stock which, in part, represents property outside the state, citing:

Kansas City, Memphis & Birmingham Railroad Co. v. *Stiles,* 242 U. S. 111;

Atlantic Refining Company v. *Virginia,* 302 U. S. 22;

Ford Motor Co. v. *Beauchamp,* 308 U. S. 331;

Great Atlantic & Pacific Tea Co. v. *Grosjean,* 301 U. S. 412;

Underwood Typewriter Co. v. *Chamberlain,* 254 U. S. 113;

Bass, Ratcliff & Gretton, Ltd., v. *State Tax,* 266 U. S. 271.

3. That the business or commercial situs of intangible assets is irrelevant in applying the formula to determine the value of the franchise of a foreign corporation to do business in the taxing state, the only test as to their use being whether they contribute to the activity carried on in the taxing state, citing:

National Leather Company v. *Massachusetts,* 277 U. S. 413.

In support of its first proposition, appellee refers to the opinion of the Supreme Court of Pennsylvania in the *Columbia* case where that court, in speaking of the method

of allocation provided in the Act of 1935, said at pp. 221 and 222:

> "It does not ascertain physical worth of assets located in this state, but arrives at a value which the functional or operating unit within this state possesses. It represents what the right to do business is worth. It must follow that the tax is not levied on property but on the franchise to do business measured by a taxable value secured through the application of the factors of gross receipts, tangibles and payrolls to the capital stock value. It is representative of the value of that very franchise."

In the instant case, the Supreme Court of Pennsylvania relied upon its former opinion in the *Columbia* case in holding that appellant's property outside of the state was not taxed. In the *Columbia* case, however, the Supreme Court of Pennsylvania, when it came to apply the general principles which it had been discussing to the record of facts in that particular case, found that the tax appealed from was imposed on the corporation's property outside of the state and accordingly, revised the tax so as to be based only upon the capital stock value of tangible and intangible assets employed by the corporation in the exercise of its franchise in the state. The court said, at pp. 225 and 226 of its opinion:

> "By these principles it is obvious that since the tax is nothing but one upon the value of a privilege and taxable measure is fundamentally *the capital stock used in connection with that privilege*, we must for the purpose of determining the validity of the tax separate from it that capital stock value which bears no relation to the privilege." (Italics ours.)

Likewise, appellant submits that the record of facts in the intant case, as indicated above, shows that the tax imposed on it is not based upon the capital stock value of its

tangible and intangible assets employed in the state but is based upon, or measured by, property and assets outside of the state.

If the Supreme Court of Pennsylvania, in the excerpt from its opinion in the *Columbia* case relied upon appellee, and appellee, at pp. 7 and 8 of its Statement Opposing Jurisdiction, are saying that the application of the allocation factors as provided in the Act of 1935 to the capital stock value of a foreign corporation transmutes the capital stock value into a result which is wholly unrelated to property and asset values, such statements and conclusion are contrary to this Court's finding in *Delaware, Lackawanna and Western R. R. Co.* v. *Pennsylvania,* 198 U. S. 341. There, this Court held that capital stock value, as used in the Act of 1889, to which the Act of 1935 is an amendment, represents property and asset values, and that a tax thereon is a tax on the property and assets making up such value.

Appellant submits that in view of the nature of the "measure" of the tax selected in the Act of 1935, the purpose of the method of allocation must be the determination of the true value of capital and property employed by appellant in Pennsylvania. This purpose is not accomplished in the instant case, as shown by appellant above, and for the reasons given in its discussion heretofore of the nature of the tax and the arbitrariness of the method of allocation. As will be developed hereinafter, if the method of allocation is to be retained, appellant's capital stock value must be limited to the capital stock value of its assets employed in its selling business and the allocation factors must be limited likewise since it is only that business which is carried on both within and without Pennsylvania.

As to the second proposition, distinction must be made between the whole "measure" of the tax and the part of the

"measure" to which the tax rate is applied, which is obtained by allocation. Appellant concedes that the whole capital stock value representing property and assets everywhere may be used as the "measure" but submits that this Court has held that the part of the "measure," which is the base of the tax, may not include, in the case of foreign corporations, extraterritorial values or activities.

James v. *Dravo Contracting Co.*, 302 U. S. 134;
Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77;
Wallace v. *Hines*, 253 U. S. 66;
Fargo v. *Hart*, 193 U. S. 490;
Delaware, Lackawanna & Western R. R. Co. v. *Pennsylvania*, 198 U. S. 341.

The cases cited by appellee in support of its proposition are not applicable in the instant case and may be distinguished on several grounds: the nature of the tax involved, the nature of the "measure," whether the tax is imposed before or after the privilege has been exercised, and whether the tax is imposed on a domestic or foreign corporation.

In the *Stiles* case, *supra*, and in *Kansas City, Ft. Scott & Memphis Railway Co.* v. *Botkin*, 240 U. S. 227, upon which the former relied, this Court held that the domiciliary state had the power to impose upon *domestic* corporations a franchise tax upon the entire authorized capital stock represented in part by property beyond the taxing state. However, this Court held in other cases that a franchise tax on *foreign* corporations could be imposed only on that part of the *issued capital stock within the taxing state.*

Roberts & Scheaffer Co. v. *Emmerson*, 271 U. S. 50;
Airway Corp. v. *Day*, 266 U. S. 71;
Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.

The Atlantic Refining Co. case, *supra,* involving an entrance fee imposed on a foreign corporation at the time of admission to do business in the taxing state; the *Great Atlantic & Pacific Tea Company* case, *supra,* involving a graduated tax on chain stores; and the *Ford Motor Company* case, *supra,* involving a franchise tax payable in advance by a foreign corporation for a limited license to do business in the taxing state for one year, advance the theory that the privilege acquired from the taxing state is dependent in value upon the possession of large financial resources outside of the taxing state which are available for use in the exercise of the privilege granted by the taxing state. Upon the payment of the tax, the taxpayer, in these cases, may bring additional capital into the taxing state or increase its volume of business there without increasing the amount of its tax during the tax period.

This theory is not applicable in the instant case, Appellant, in 1933, received a Certificate of Authority to do business in Pennsylvania for an unlimited period of time. If the Act of 1935 imposes a tax on appellant for the privilege of doing business in Pennsylvania, the tax is imposed *after* the privilege has been exercised and is based upon the amount of capital that had been employed in the exercise thereof in Pennsylvania. Failure to pay the tax does not result in forfeiture of the right to do business in Pennsylvania.

At pp. 22 and 23 of Appellant's Statement As To Jurisdiction, further distinguishing features of the Texas tax involved in the *Ford Motor Company* case, *supra,* are pointed out.

The *Ford Motor Company* case, and the *Underwood Typewriter Co.* and *Bass, Ratcliff & Gretton* cases, the latter two involving net income as the measure of the tax, develop the unitary enterprise theory. This theory ap-

pears to have originated in the *Bass* case. There, this Court held that a company engaged in purchasing of raw materials and manufacturing in a foreign country and selling its products in New York constituted a unitary enterprise, and that, since its net income was produced by the series of transactions, the entire income was subject to allocation. The allocation factors used were deemed to "reflect the relative contribution of the activities in the various states to the production of the unitary income." In so far as the record shows, the allocation factors were applied only to the so-called unitary income arising from manufacturing and selling ale—and not to income from intangibles.

In the instant case, appellant's capital stock value which is the "measure" of the tax is not produced by a series of business transactions but by property and asset values, as had been shown heretofore. Therefore, a proper application of the unitary theory would require that the allocation factors be representative of property and asset values, including intangibles. That this is not done is conceded by appellee.

Even though engaged in a unitary enterprise, appellant employs different capital in varying amounts in different activities. It is not engaged in a single activity with the same capital employed throughout its enterprise. Therefore, when allocation factors not representative of capital and property are applied to capital stock value, the true value of the property employed in Pennsylvania correlated in use with total property is not determined, but there is allocated to Pennsylvania a proportion of the capital stock value of all property and assets no matter where located and employed. Appellant submits that, if the method of allocation provided in the Act of 1935 is to be retained, it must be limited and applied only to

appellant's capital stock value pertaining to its selling business, in which common capital would most likely be employed in and out of Pennsylvania.

As to the third proposition, if business or commercial situs of intangible assets is to be disregarded, the question in determining whether they are to be included in the tax computation, is not whether they *contribute* to the activity in the taxing state, but whether they are *used* in the activity in the taxing state. This is aptly illustrated by the case of *National Leather Co.* v. *Massachusetts,* 277 U. S. 413.

There, the question was whether the investment in the stocks of two subsidiary companies by a foreign corporation doing business in Massachusetts represented capital employed by it in the state so as to be included in the numerator of the asset fraction which was to be applied to the capital stock value of its corporate excess in the computation of its tax. This Court held that even though the stocks might not have a business or commercial situs in Massachusetts they represented capital employed by the foreign corporation in carrying on its business in the state *"to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the state."*

On the authority of this case, appellant's investment in United States securities, State, County and Municipal securities and in shares of stock of subsidiary corporations should be excluded from the computation of its tax because they were located, employed and used outside of Pennsylvania in functions and activities wholly different from its selling activity in Pennslyvania (R. 178a, 184a, 185a, 188a).

Contrary to appellee's contention, the business or commercial situs of intangibles is important in the cases arising under the franchise tax statutes of other states. See:

New York v. *Latrobe*, 279 U. S. 421 (New York);
International Shoe Co. v. *Shartel*, 279 U. S. 429 (Mo.);
Hump Hairpin Manufacturing Co. v. *Emmerson*, 258 U. S. 290 (Illinois);
Ford Motor Company v. *Okla. Tax Commission*, 106 P. 2d 803 (Oklahoma).

In these cases, the rule of business situs or commercial domicile was applied to determine whether intangible assets were to be included in the numerator of the asset allocation fraction in the tax computation.

Appellant concedes that it is a unitary enterprise in the sense that it is an integrated concern engaged in purchasing of raw materials and the manufacturing and selling of cereals and cereal products. All of its property and assets contribute to and produce the actual cash value of its whole capital stock which includes total enhancement in value by reason of correlation in use of its property within and without Pennsylvania. In the instant case, each asset dollar has a capital stock value of $1.23 (R. 179a), or an enhanced value of 23 cents.

The Supreme Court of Pennsylvania and appellee say that the true correlated value of appellant's property employed in Pennsylvania is to be determined by the proportion of the allocation factors applied to appellant's whole capital stock value which, appellant contends, results in allocating to Pennsylvania not only a proportion of the asset value of property located and employed outside the state but also a proportion of the enhanced value of such assets as reflected in the whole capital stock valuation. This is shown by the fact that the taxable valuation obtained is $3,327,476 which is 143 times the asset value

of $22,440 employed in Pennsylvania. This result is produced because the allocation factors are not representative of location and use of assets.

Appellant submits that the application of the theories of unitary enterprise and correlation of use of assets can be made effectively and properly in the instant case, only by the use of an asset ratio of property employed in that state total assets applied to its whole capital stock value because the basis of the tax is the capital stock value of property employed in Pennsylvania. It has already paid a privilege tax for 1935 on the basis of business activities producing income, under the provision of the Act of May 16, 1935, P. L. 208, 72 Purdon's Statutes, sections 3420a-3420n.

(d)

The case of Ford Motor Company v. Beauchamp, 308 U. S. 331.

Appellee contends that the principles of this case are applicable in the instant case. Appellant has pointed out the distinguishing features of the Texas and Pennsylvania statutes at pages 22 and 23 of its Statement As To Jurisdiction and submits that the *Ford* case is not applicable in the instant case because of the differences there pointed out and the difference in the power to impose the particular kind of tax selected.

The difference in the power of a State over entrance fees and over taxes was pointed out by this Court in *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494, at pages 510 and 511.

The amount and basis of the entrance fee which a State may impose upon a foreign corporation seeking admission to do business are almost wholly within the discretion of

the State, *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22. Under the Texas statute, a franchise tax is imposed for a limited license to do business for one year, *Southern Realty Co.* v. *McCallum*, 65 F. (2d) 934, certiorari denied 290 U. S. 692, and is in the nature of an entrance fee. Since the tax is imposed after the corporation has been admitted but *before* it begins business for the tax year, the "measure" of the tax is apportioned to avoid violation of the Commerce Clause. Upon payment of the tax, the corporation may increase the volume of its business or the amount of capital employed without increasing its tax during the year.

Tax under the Pennsylvania Act of 1935 is imposed on appellant after it had been admitted to do business in the state. It is not imposed for the privilege or license to do business, but after the exercise of the privilege. The power to impose such a tax is more limited. Furthermore, the Act of 1935 itself contains limitations by reason of the nature of the "measure" of the tax selected, which contemplates as the basis of the tax the capital stock value of property and assets employed by appellant in Pennsylvania. Therefore, appellant submits that the principles applicable to the Texas tax and basis of apportionment are not applicable in the instant case where the tax is wholly different.

(e)

Do the Act of 1935 and the tax imposed on appellant thereunder deny to it the equal protection of the laws?

Appellant contends that this issue presents a substantial federal question which has been decided by this Court contrary to the rulings of the Supreme Court of Pennsylvania in the instant case.

Appellant owned United States securities valued at $14,901,015 (R. 178a) and shares of subsidiary corporations valued at $1,663,499 (R. 177a, 178a). Prior to 1935, such investments when owned by either domestic or foreign corporations, were not taxed. Under the Act of 1935, which retained the same "measure" of tax on both domestic and foreign corporations, to wit, the actual value in cash of the whole capital stock, such investments were included in the computation of the tax on appellant and increased its tax by $4,537.61 but were exempted from tax when owned by domestic corporations of the same kind (R. 183a, 184a, 185a). Thus the tax base for domestic corporations is less than the whole because of exemptions allowed, but the tax base for appellant and other foreign corporations is *the full amount* of the capital stock value attributed to Pennsylvania. Under these circumstances, appellant contends that, on the basis of the decisions of this Court in *Southern Railway Co.* v. *Greene*, 216 U. S. 400, and in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, it is discriminated against and denied the equal protection of the laws. These cases involved taxes imposed on foreign corporations after having been admitted to do business. The same situation exists in the instant case.

Appellee contends that the question presented is not substantial and advances in support thereof, four propositions:

1. That the purpose of the Act of 1935 was not to discriminate against foreign corporations but to remove the discrimination against domestic corporations which previously existed.

2. That a state may place a foreign corporation in a different class from domestic corporations for the purpose of taxation and impose a different rate of tax upon the

foreign corporation for the privilege of doing business within its territory, citing:

Kansas City, Memphis & Birmingham Railroad Co. v. *Stiles,* 242 U. S. 111;
Madden v. *Kentucky,* 309 U. S. 84;
Concordia Fire Insurance Co. v. *Illinois,* 29 U. S. 535;
Kidd v. *Alabama,* 188 U. S. 730;
Cheney Brothers Company v. *Massachusetts,* 246 U. S. 147.

3. That the *Southern Railway Co.* and *Hanover Fire Insurance Co.* cases can be distinguished.

4. That appellant has not proved that it has been discriminated against since, if it were a domestic corporation, its tax would be ten times more than the tax imposed against it under the Act of 1935.

As to the first proposition, appellant submits that no matter what the purpose of the Act of 1935 was, the result of its provisions and operation is to discriminate against appellant and other foreign corporations similarly situated when the basis of the tax on foreign corporations is *the full amount* of capital stock value attributed to Pennsylvania and the basis of the tax on domestic corporations is less than the full amount of capital stock value attributed to Pennsylvania because of exemptions allowed. The purpose of the Act of 1935 to reach the intangibles of foreign corporations that were taxed to domestic corporations is not accomplished without discrimination when all of the intangibles of foreign corporations but not all of the intangibles of domestic corporations in Pennsylvania are taxed. The denial to foreign corporations of the exemptions allowed to domestic corporations of the same kind is the very essence of discrimination.

As to the second proposition, appellant concedes that, at the time of seeking to do business in a state, foreign corporations may be separately classified and taxed, but appellant submits that the cases cited by appellee do not support the proposition that foreign corporations, after having been admitted, may be separately classified, unless substantial differences exist, and a greater tax burden be imposed on them than on domestic corporations of the same kind.

In the *Stiles* case, and in the *Cheney Brothers Company* case, the basis of the tax on domestic corporations is the *whole* of the "measure" without any exemptions, while the basis of the tax on foreign corporations is only that part of the "measure" within the taxing state.

In the *Concordia Fire Insurance Co.* case, it was not shown that the tax on domestic and foreign corporations was not equivalent. In Pennsylvania, the tax burden on foreign corporations is greater than on domestic corporations. Both domestic and foreign corporations are subject to tax on their net income under the Act of May 16, 1935, P. L. 208, 72 Purdon's Statutes, sections 3420a-3420n; and are subject to tax under the Act of 1935 involved in the instant case, but under said Act, exemptions are allowed to domestic corporations and not to foreign corporations. This difference of treatment under the said Act of 1935 increases appellant's tax by $4,537.61.

In the *Kidd* case, shares of foreign corporations not doing business in Alabama were taxed in the hands of resident shareholders while shares of domestic corporations and foreign corporations doing business in the state were not taxed.

The *Madden* case involved the taxation by Kentucky of the bank deposits of a resident in the state at a lower rate than his bank deposits in another state.

The only basis for separate classification and taxation of foreign corporations in the Act of 1935, as found by the trial court (R. 192a), is difference in domicile only. This Court held in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, at page 511, that "after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind."

As to the third proposition, appellant submits that the *Southern Railway Co.* and *Hanover Fire Insurance Co.* cases cannot be distinguished and are applicable in the instant case. Appellee attempts to distinguish these cases on the ground that in the first case the railroad company's investments in the state were permanent and in the second case, "the insurance company had done business in Illinois for a number of years and had built up a large business and good will and had many agents and extensive records there." This Court, in the *Hanover Fire Insurance Co.* case, at p. 508, held that the distinction as to permanency of investments is not controlling. Except for probable difference in extent of doing business in the taxing state, appellant's situation in Pennsylvania is similar to that of the insurance company involved in the *Hanover Fire Insurance Co.* case.

As to the fourth proposition, appellant submits that the comparison of the tax appellant would pay if it were a domestic corporation with the tax imposed against it as a foreign corporation cannot be made the test to determine whether appellant is being discriminated against. This tax comparison is wholly without foundation in the law and presupposes a situation that doesn't exist. Pennsylvania has no power to tax appellant, as a foreign corporation, to the same extent as if it were a domestic corporation unless appellant did everything or had acquired a commercial domicile in Pennsylvania, which is not the fact in the instant case.

The domiciliary state may impose a franchise tax on domestic corporations measured by *their entire authorized capital stock*, but such a tax on foreign corporations violates the due process and commerce clauses of the Federal Constitution.

Kansas City, Ft. S. & M. Co. v. *Kansas*, 240 U. S. 227;
Roberts & Scheafer Co. v. *Emmerson*, 271 U. S. 50.

The domiciliary state may impose tax upon *all* of the intangibles of a domestic corporation on the basis of presumption of situs at the domicile;

Cream of Wheat Co. v. *Grand Forks*, 253 U. S. 325;
Newark Fire Ins. Co. v. *State Board*, 307 U. S. 313;

but may impose tax only upon such intangibles of a foreign corporation as have acquired a business or commercial situs in the taxing state.

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.

The test proposed by appellee, and adopted by the Supreme Court of Pennsylvania, for use in determining whether appellant is discriminated against is the same as saying that an otherwise unconstitutional tax on appellant is constitutional because that is the amount of tax appellant would be made to pay if it could be induced to become a domestic corporation, and thus create a domiciliary situs for its intangibles in Pennsylvania. Such an attempt by way of supposition to support an unconstitutional tax was condemned by this Court in *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 77, where it said, at p. 81:

> "It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely • • • *because the state might tax transactions which the corporation carried on outside the state if it were induced to carry them on within.*" (Italics ours.)

Appellant submits that the proper test to use in determining whether it is being discriminated against is a comparison of the tax burden on it and a domestic corporation of the same kind *on the same amount of comparable capital or property;* and this test shows that appellant's tax is increased $4,537.61 by reason of its ownership of United States securities and shares of subsidiary corporations which are exempted to domestic corporations.

(f)

Do the Act of 1935 and the tax imposed on appellant thereunder impair the obligation of the contract between appellant and the Commonwealth?

This issue presents a substantial federal question and is submitted by appellant to have been ruled in its favor by the decision of this Court in *American Smelting and Refining Co.* v. *Colorado,* 204 U. S. 103.

Appellant contends that a contract guaranteeing to it equality of taxation with domestic corporations of the same kind was created between it and the Commonwealth of Pennsylvania by the Act of May 28, 1907, which was later repealed and its provisions written into Section 1010 of the Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes, section 2852, which provides:

> "A foreign business corporation which shall have received a certificate of authority under this Act, so long as such certificate of authority shall not be revoked or cancelled, shall enjoy the same rights and privileges as a domestic business corporation, but no more, and, except as in this act otherwise provided, *shall be subject to the same liabilities, restrictions, duties and penalties now in force or hereafter imposed upon domestic business corporations,* to the same extent as if it had been organized under this Act to transact the business set forth in its certificate of authority." (Italics ours.)

Appellant submits, on the authority of the *American Smelting and Refining Co.* case, that the Act of 1935 impaired the obligation of this contract when the said Act as applied to appellant increased its tax by $4,537.61 by reason of its ownership of United States securities and shares of subsidiary corporations, which when owned by domestic corporations of the same kind are exempted from capital stock tax. In that case, this Court held that the provisions of the Colorado law which were similar to the provisions of Section 1010 of the Pennsylvania Business Corporation Law of 1933 created a contract with foreign corporations, *after they had previously been admitted to do business,* which guaranteed to them equality of taxation with domestic corporations; and that this contract was impaired by an Act imposing a state license tax on domestic corporations at the rate of *two cents* upon each $1,000 of their capital stock and on foreign corporations at the rate of *four cents* upon each $1,000 of their capital stock. In the instant case, although the tax rate on both domestic and foreign corporations is five mills, the allowance of exemptions to domestic corporations that are not allowed to foreign corporations produces, in effect, a lower tax rate for domestic corporations.

The Supreme Court of Pennsylvania, without finding that a contract existed and what its terms were, disposed of this issue by holding that an equivalent tax burden is imposed on domestic and foreign corporations under the Act of 1935 because, if appellant were a domestic corporation, its tax under said Act would have been greater than that imposed against it as a foreign corporation. In the discussion heretofore of the issue as to denial of equal protection of the laws, it was shown that this comparison had no application in the determination of that issue. The same reasoning applies here.

Under the circumstances, this Court has held that, as to the question of contract impairment by a state statute challenged as invalid, it must determine, as federal questions, the existence of the contract, and the extent of its obligations, and that it will not accord finality to the views of the state court.

Irving Trust Co. v. *Day*, 314 U. S. 556.

Appellee contends that this issue does not present a substantial federal question and in support hereof, advances four propositions:

1. That the provisions of section 1010 of the Act of 1933, quoted above, even though embodying a contract between the appellant and the Commonwealth, do not relate to matters of taxation but refer only to the rights conferred and the liabilities imposed by the Act of 1933 itself.

2. That said section 1010 did not create a contract between appellant and the Commonwealth because its rights and liabilities are to be tested as if it were incorporated under said Act of 1933; and, since under the provisions of Article XVI, section 10 of the Pennsylvania Constitution, the right to alter, revoke or annul any charter of incorporation of domestic corporations is reserved, the Certificate of Authority granted to appellant and other foreign corporations is revocable also.

3. That the said Act of 1935 constitutes an amendment, alteration or modification of the certificate of authority granted to appellant.

4. That, in any event, the alleged contract is not impaired because the tax liability of the appellant in the instant case is less than it would have been if it had been organized under the said Act of 1933.

The *American Smelting and Refining Company* case, *supra,* answers completely in the negative the first three propositions advanced by appellee. It held that language in the Colorado law similar to that in section 1010 of the Pennsylvania law related to matter of taxation; that the reservation of the power to alter, amend or revoke the charter of a domestic corporation is not applicable; and that the tax law involved was not an alteration or revocation of the privilege granted to a foreign corporation to do business in the taxing state. This case has not been overruled by *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, cited by appellee, or by any other case decided by this Court.

Section 1013 of the said Business Corporation Law of 1933 sets forth the causes for which the Certificate of Authority of a foreign corporation may be revoked or cancelled. Appellant submits that neither under said section, nor under the reserved power in Article XVI, section 10, of the Pennsylvania Constitution, has there been an actual revocation or cancellation of appellant's Certificate of Authority; and that until such event occurs, the obligation of appellant's contract with the Commonwealth remains effective.

It is not asserted by appellant that the method used by Pennsylvania in taxing foreign corporations prior to 1935 cannot be changed. That can be done provided foreign corporations are not placed at a disadvantage as compared with domestic corporations; but appellant submits that the difference created in the Act of 1935 by excluding from the multiplicand in the tax base the value of certain investments in the case of the domestic corporation and not excluding the value of such investments from the multiplicand in the case of appellant, a foreign corporation, is a palpable breach of its contract with the Commonwealth.

As to appellee's fourth proposition, appellant submits that the test proposed by appellee for the determination of this issue is not applicable and is wholly without foundation in the law as has been shown heretofore in appellant's discussion of the issue as to the denial of equal protection of the laws.

(g)

Does the Act of 1935, as construed and applied in imposing tax on appellant, unduly and unlawfully burden interstate commerce?

This issue presents a substantial federal question since there is drawn in issue the validity of the statute as applied.

Memphis Gas Co. v. *Beeler*, 315 U. S. 649.

The question has not been passed upon directly by this Court. However, the principles laid down by this Court in other cases are against the validity of the statute as applied in the instant case.

This Court said in *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, at p. 366:

> "Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence, a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem."

All of appellant's manufacturing plants were located outside of Pennsylvania (R. 177a). Its commercial domicile was in Chicago, Illinois (R. 177a). It had an extensive sales organization throughout the United States. Two sales offices were located in Pennsylvania, in connection with which a small inventory of goods was kept in a public warehouse (R. 181a, 182a). Salesmen connected with these two

offices obtained orders which gave rise to sales in the amount of $7,224,347.

Except for sales of $171,773 made from Pennsylvania stocks to Pennsylvania customers, the remainder of the sales in the amount of $7,052,574 arising from orders obtained by the Pennsylvania sales offices were made in interstate commerce. This is conceded by the appellee on page 40 of its Statement Opposing Jurisdiction. They were controlled by, and approved or rejected at, appellant's home office in Chicago. There, the customers' credit was passed upon, their accounts were kept, and invoices were made out. Shipments were made from stocks or from mills outside of Pennsylvania to customers in Pennsylvania in the amount of $5,341,783 and to customers outside of Pennsylvania in the amount of $1,710,781 (R. 145a, 146a, 182a, 222a). In connection with these sales, remittances were generally made to Chicago (R. 73a, 87a) and not to the Pennsylvania sales offices, as stated by appellee on page 35 of its Statement Opposing Jurisdiction. The total value of appellant's property in Pennsylvania is $22,440 (R. 180a, 183a).

In the computation of tax against appellant, the Supreme Court of Pennsylvania and appellee interpret the Act of 1935 as requiring that the intrastate receipts of $171,773 and the *whole* of the interstate receipts of $7,052,574 be included in the numerator of the gross receipts allocation fraction.

Appellant contends that, under the facts in the instant case, the said Act of 1935 as so interpreted discriminates against and burdens interstate commerce because the interstate receipts of $7,052,574, which arose from activities and employment of capital both within and without the state, are not apportioned to the commerce carried on *within* the state. If the interstate receipts without apportionment could be made the measure of a tax laid in every state where

the commerce is carried on, the interstate commerce is subjected to multiple taxation not borne by local commerce.

Western Live Stock v. *Bureau*, 303 U. S. 250.

If the "taxable value" of appellant under the Act of 1935 represents the value of its franchise exercised *within the state*, interstate commerce is unduly and unlawfully burdened when there is included in the computation of such "taxable value" gross receipts *which arose in part from franchises exercised and commerce carried on without the state.*

The use of the *whole* of the interstate receipts in the computation of the tax has been approved only where local management and manufacturing activities in the taxing state preceded the sale and where the amount of the tax did not exceed that which could have been imposed directly on the property.

Hump Hairpin Mfg. Co. v. *Emerson*, 258 U. S. 290;
United States Glue Co. v. *Town of Oak Creek*, 247 U. S. 321;

or where the *whole* of the interstate activity is carried on in the taxing state:

Western Live Stock v. *Bureau*, 303 U. S. 250;

or where the corporation has acquired a commercial domicile in the taxing state:

Memphis Gas Co. v. *Beeler*, 315 U. S. 649.

Such are not the facts in the instant case.

Where a franchise tax is imposed in lieu of a property tax and gross receipts are used to measure the true value of property and capital employed in the taxing state—as appears to be the theory in the instant case—this Court has approved the use of intrastate receipts and *only that*

part of the interstate receipts attributable to the taxing state:

Maine v. *Grand Trunk Rwy. Co.*, 142 U. S. 217;
Cudahy Packing Co. v. *Minnesota*, 246 U. S. 450;
Pullman Co. v. *Richardson*, 261 U. S. 330.

In *Matson Navigation Co.* v. *State Board*, 297 U. S. 441, this Court approved the use by California of only 22.2% of interstate receipts. Under the Texas statute, no interstate receipts are used. *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 335.

Appellee contends that the issue does not present any substantial federal question for the reason that the Pennsylvania tax is not a tax upon gross receipts which are used only as a measure in one of the three fractions, in computing the franchise tax upon the privilege of doing business in Pennsylvania, citing:

International Shoe Co. v. *Shartel*, 279 U. S. 429;
Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290;
Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68;
Western Cartridge Co. v. *Emmerson*, 281 U. S. 511;
Western Live Stock v. *Bureau*, 303 U. S. 250.

In reply, appellant submits that the factual situations in these cases were wholly different from those in the instant case, or the principles laid down are not applicable.

In the *Shartel* case, the allocation ratio in the taxing state was local assets and *local* business, and this Court held that the tax was not invalid under the commerce clause because *property* used in computing the tax was used in interstate commerce.

In the *Hump Hairpin Manufacturing Co.* and *Western Cartridge Co.* cases, substantially all of the property was located, and local management and manufacturing activi-

ties preceding the sales were carried on, in the taxing state.

In the *Baltic Mining Co.* case, it does not appear what proportion of the interstate receipts were used in computing the tax.

In the *Western Live Stock* case, *all* the interstate activity was carried on in the taxing state.

Conclusion

It is respectfully submitted that the issues raised by appellant in this case present substantial federal questions; that this Court has jurisdiction for the reasons set forth herein; and that the Motion to Dismiss or Affirm should be denied.

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Service of a copy of the foregoing Brief this 1st day of February, 1945, is hereby acknowledged.

James H. Duff,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 873

THE QUAKER OATS COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Nature of the Pennsylvania Franchise Tax on foreign corporations	1
Nature of appellant's business	3
The Pennsylvania Franchise Tax imposed by the Act of 1935 is a tax upon the privilege of doing business in that State and not a tax on property	5
The method of allocation provided in the Act of 1935 is not arbitrary or unreasonable	10
Neither the Franchise Tax Act of 1935 nor the method of allocation used in this case imposes a tax upon property located outside of Pennsylvania	13
Appellant's analysis of Ford Motor Co. v. Beauchamp, 308 U. S. 331	17
The Act of 1935 and the tax imposed on appellant thereunder do not deny to it the equal protection of the laws	17
Neither the Act of 1905 nor the assessment of tax against the appellant thereunder impairs the obligation of contract	22
The Act of 1935, as construed by the State Courts, does not unlawfully burden interstate commerce	34
Motion to dismiss or affirm	39

Table of Cases Cited

Arrott's Estate, 322 Pa. 367	9
Atlantic Refining Co. v. *Virginia*, 302 U. S. 22	14
Baltic Mining Co. v. *Mass.*, 231 U. S. 68	37
Bass, Ratcliff and Gretton v. *State Tax Commission*, 266 U. S. 271	15
Butler Bros. v. *McColgan*, 315 U. S. 501	10,11,13
Cheney Brothers Company v. *Massachusetts*, 246 U. S. 147	18,20,21

Page

City of Pocatello v. *Fidelity & Deposit Co. of Maryland*, 267 F. 181 26
Colgate v. *Harvey*, 296 U. S. 404 19
Commonwealth v. *The American Gas Co.*, 54 Daup. 115 .. 23
Commonwealth v. *Columbia Gas and Electric Corp.*, 336 Pa. 209 5,7,9,13,17
Commonwealth v. *Union Trust Company of Pittsburgh*, 345 Pa. 298 9,10
Commonwealth, ex rel. Baldbridge v. *Sun Oil Co.*, 294 Pa. 99 25
Concordia Fire Insurance Co. v. *Illinois*, 292 U. S. 535 .. 18,19
Connecticut Mutual Life Insurance Co. v. *Spratley*, 172 U. S. 602 25
Doyle v. *Continental Insurance Co.*, 94 U. S. 535 25
Educational Films Corp. v. *Ward*, 282 U. S. 379 13
Ellis v. *Dodge Bros.*, 237 F. 860 25
Flint v. *Stone Tracy Co.*, 220 U. S. 107 13
Ford Motor Co. v. *Beauchamp*, 308 U. S. 331 .. 8,12,15,16,17
Ford Motor Co. v. *Clark*, 100 F. (2d) 515 15
Ford Motor Co. v. *Okla. Tax Comm.*, 188 Okla. 78, 106 Pac (2d) 803 12
Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U. S. 412 15
Hammond Packing Co. v. *Arkansas*, 212 U. S. 322 27,28
Hanover Fire Insurance Co. v. *Carr*, 272 U. S. 494 20
Heisler v. *Thomas Colliery Co.*, 260 U. S. 245 19
Home Insurance Co. v. *Augusta*, 93 U. S. 116 25
Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290 .. 37
International Harvester Co. v. *Dept. of Treasury*, 322 U. S. 340 36
International Shoe Co. v. *Shartel*, 279 U. S. 429 37
Interstate Iron & Steel Co. v. *Northwestern Bridge & Iron Co.*, 278 F. 50 26
Iron City Bank v. *City of Pittsburgh*, 37 Pa. 340 28
Kansas City, Memphis & Birmingham Railroad Co. v. *Stiles*, 242 U. S. 111 14,18
Kidd v. *Alabama*, 188 U. S. 730 18,32
Madden v. *Kentucky*, 309 U. S. 83 18,19,20
National Leather Co. v. *Massachusetts*, 277 U. S. 413 .. 16

Page

Northwestern Mutual Life Insurance Co. v. *Wisconsin*, 247 U. S. 132 21
People, ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N. Y. 48, 129 N. E. 202, 256 U. S. 702 13
Phillips Petroleum Co. v. *Jenkins*, 297 U. S. 629 28
Rule v. *Price*, 323 Pa. 139 15
Society for Savings v. *Coite*, 73 U. S. 590 8
Southern Railway Co. v. *Greene*, 216 U. S. 400 20
Town of Southington v. *Southington Water Co.*, 80 Conn. 646, 69 Atl. 1023 28
Treasury of Indiana v. *Allied Mills*, 220 Ind. 340, 42 N. E. (2) 34, 318 U. S. 340 36
Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113 15
Velie Motor Car Co. v. *Kopmeier Motor Car Co.*, 194 F. 324 26
Wagner Free Institute v. *Philadelphia*, 132 Pa. 612 28
Western Cartridge Co. v. *Emmerson*, 281 U. S. 511 37
Western Live Stock v. *Bur. of Revenue*, 303 U. S. 250 ... 37

STATUTES CITED

Act of June 22, 1931 of the Pennsylvania Legislature, Section 1, P.L. 687, 72 P.S. Section 1894 31
Act of May 16, 1935 of the Pennsylvania Legislature, P.L. 184 (72 Purdon's Penna. Stat., Section 1871, amending the Act of June 1, 1889, P.L. 420 (72 Purdon's Penna. Stat., Section 1871, et seq.) 1,34
Business Corporation Law of May 5, 1933 of the State of Pennsylvania, Section 1010–1013 (P.L. 364, 15 P.S. Section 2852–1010) 3,22
Constitution of Pennsylvania:
Art 12, Sec. 16 28
Art. 16, Sec. 10 26
Williston on Contracts, Volume 1:
Section 43, page 126 26
Section 105, page 365 25

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COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION

Appellee respectfully submits that the questions presented by the appellant's jurisdictional statement have been settled by the decisions of this Court and are not substantial.

Nature of the Pennsylvanina Frachise Tax On Foreign Corporations

The tax in question was imposed by the Act of May 16, 1935, P. L. 184 (72 Purd. Penna. Stat., Section 1871, Pocket Part). This statute amended the Act of June 1, 1889,

P. L. 420 (72 Purd. Penna. Stat., Section 1871 *et seq.*) by adding the following provision:

"(b) Every foreign corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a *franchise tax* at the rate of five mills upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts.

"(1) Of one third, such portion shall be *attributed to business carried on within the Commonwealth,* as shall be found by multiplying said third by a fraction, whose numerator is the value of the taxpayer's *tangible property* not actually and exclusively used in manufacturing, situated within the Commonwealth, and whose denominator is the value of all the taxpayer's tangible property wherever situated.

"(2) Of another third, such portion shall be *attributed to business carried on within the Commonwealth,* as shall be found by multiplying said third by a fraction, whose numerator is the expenditures of the taxpayer for *wages, salaries, commissions,* or other compensation to its employes not exclusively engaged in manufacturing in this Commonwealth and assignable to this Commonwealth as hereinafter provided, and whose denominator is the total expenditures of the taxpayer for wages, salaries, commissions, or other compensation to all its employes.

"(3) Of the remaining third, such portion shall be *attributed to business carried on within the Commonwealth,* as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's *gross receipts* from business not strictly in-

cident or appurtenant to manufacturing in this Commonwealth assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business.

"The sum of the amounts, determined in accordance with the foregoing three rules, shall be the *taxable value.* * * *" (Italics ours)

The final tax assessment, approved by the Supreme Court of Pennsylvania, was calculated as follows:

"Tangible property in Penna	$22,440
Total tangible property	25,072,615
Wages paid in Penna.	$143,259
Total wages paid	6,212,221
Gross receipts in Penna.	$7,224,347
Total gross receipts	66,067,332
	(218a)"

$$\frac{22{,}440}{25{,}072{,}615} \times \frac{1}{3} \times \$74{,}885{,}804 = \$22{,}340$$

$$\frac{143{,}259}{6{,}212{,}221} \times \frac{1}{3} \times \$74{,}885{,}804 = \$575{,}643$$

$$\frac{7{,}224{,}347}{66{,}067{,}332} \times \frac{1}{3} \times \$74{,}885{,}804 = \$2{,}729{,}543$$

Total taxable value	$3,327,526
Rate of tax 5 mills	$16,637.38
	(253a)

Nature of Appellant's Business

The Quaker Oats Company, the appellant, is a New Jersey corporation, and on August 24, 1933, received a certificate of authority under the Business Corporation Law of May 5, 1933, P. L. 364, 15 P. S. Section 2852, which authorized it "to transact in the Commonwealth of Pennsylvania the

business of selling and dealing in cereals and cereal products." (137a)

The Quaker Oats Company in 1935 operated sales offices in Philadelphia and Pittsburgh. During that year it owned tangible property in Pennsylvania amounting to $22,400 and paid wages to its employes in Pennsylvania, in the sum of $143,259, and secured gross receipts from sales in Pennsylvania amounting to $7,224,347 (218a). Included in tangible property were inventories on stocks of goods, and automobiles maintained at its two sales branches (75a-76a, 86a-87a, 98a).

The territory of the Philadelphia branch included southern New Jersey and portions of Maryland and Delaware, in addition to Pennsylvania (96a-97a). The territory of the Pittsburgh office included the entire State of West Virginia, with the exception of two counties, the eastern portion of Ohio, and one town in Virginia, in addition to Pennsylvania (94a).

The receipts of sales were deposited in a treasurer's account in Philadelphia and Pittsburgh. These accounts were subject to the exclusive control of the Chicago office (99a). Also each of the branches in Philadelphia and Pittsburgh had a sales office account in which the Chicago office deposited money to pay salaries and expenses of salesmen, office rent and incidentals (98a, 99a).

The average balance in the Philadelphia sales office account was $3,567.48 (74a). The average balance in the Pittsburgh sales office account was $1,218.04 (74a). The average balance in the treasurer's account in Philadelphia was $351,553.42, and the average balance in the treasurer's account in Pittsburgh was $54,695.54 (74a).

Defendant's sales were divided into two classes: sales of package goods and sales of goods in bulk. No separate books were kept for these two classes of business (118a),

and it was not possible to separate the total sales into the respective amounts for these two classes.

The total sales in Pennsylvania were made up as follows (21st Find. 221a):

Sales to Pa. customers on orders filled from stocks in Pa.	$ 171,773
Sales to Pa. customers on orders filled from stocks outside of Pa.	5,341,783
Sales to customers outside of Pa. delivered from stocks in Pa.	14,815
Sales to customers outside of Pa. delivered from stocks outside of Pa.	1,710,769

The method of making the sales through salesmen is detailed under heading (g).

The contention in appellant's statement as to jurisdiction will be considered in their order.

(a)

The Pennsylvania Franchise Tax imposed by the Act of 1935 is a tax upon the privilege of doing business in that State and not a tax upon property.

The nature of the tax was defined by the opinion of the Supreme Court of Pennsylvania in this case as follows:

> "* * * This Act imposes a *franchise* or *excise* tax upon foreign corporations, as distinguished from a property or ad valorem tax. * * * (Opinion, p. 3)

Previously the same court had definitely announced the same conclusion in *Commonwealth* v. *Columbia Gas and Electric Corporation*, 336 Pa. 209 (1939), where it said:

> "Did the legislature intend to change its old policy of levying a property tax and create in its stead a franchise tax upon foreign corporations? We concur with the court below in its conclusion that the tax is a fran-

chise tax and not a property tax. * * * (217) The incidence of a franchise or privilege tax is upon a franchise or privilege and not upon property or capital. * * * (218)

* * * * * * *

"* * * These fractions, as stated above, concern corporate activity. While they bear some relation to capital stock value, intrinsically they determine the taxable value of the corporate activity within this State rather than of the property located here. That it is the value of the franchise rather than the actual value of the property which is taken into account is clear from the factors which enter into the apportionment. * * * It does not ascertain physical worth of assets located in this State, but arrives at a value which the functional or operating organic unit within this State possesses. It represents what the right to do business is worth. It must follow that the tax is not levied on property but on the franchise to do business measured by a taxable value secured through the application of the factors of gross receipts, tangibles and payrolls to the capital stock value. It is representative of the value of that very franchise." (221-222)

Appellant argues that if a tax is measured by property according to its appraised value, it is a tax upon property.

This contention overlooks the fact that the Pennsylvania franchise tax is based upon *three fractions:* not merely upon the proportion of tangible assets in Pennsylvania, but upon the proportion of wages paid and gross receipts obtained in this state. The second and third of these fractions have nothing to do with property. The first fraction may show the proportion of tangible property employed in Pennsylvania, but the second and third fractions do not.

As the Supreme Court of Pennsylvania has said in the passage above quoted, the application of the three frac-

tions "determine the taxable value of the corporate activity within this State rather than of the property located here." (221)

The wages fraction clearly measures activity. The receipts fraction also measures activity by considering the amount of business done and the amount of money which the corporation captures and removes from this State. If the appraised value of property employed in Pennsylvania were the sole measure, one-sided results would be obtained. For example, if a foreign corporation had its manufacturing plant, shipping facilities and inventory entirely in Pennsylvania, then it would have to be taxed on substantially its entire assets, although its sales were made entirely in Ohio or some other state. Vice versa, if the manufacturing plant and inventory were located in Ohio but the corporation sold all its products in Pennsylvania and had only salesmen operating in Pennsylvania, the tax to be collected by Pennsylvania would be negligible. The tax to be collected by Pennsylvania could not be influenced by the sales activities and large receipts obtained in this State. This, of course, applies especially to the Quaker Oats appeal.

As the Supreme Court of Pennsylvania said in *Commonwealth* v. *Columbia Gas and Electric Corporation,* 336 Pa. 209, at page 221, the use of three fractions is an attempt to make the measure more representative of the actual worth of the franchise to do business and to average out any hardship which might arise by reliance upon any single one of the fractions. All this is wholly inconsistent with the contention that the tax is a tax upon property.

While the three fractions are applied to the value of the capital stock, two of these fractions do not depend at all upon property or the amount thereof.

An examination of the Pennsylvania formula and its three fractions as they appear above on page 3 will demonstrate that a tax is not imposed according to a valuation of property.

Furthermore, the tax base is obtained by multiplying two factors. The multiplier is the average of the three fractions or percentages. The multiplicand is the value of the capital stock. The multiplier is just as important as the multiplicand in determining whether the tax is a tax upon property.

While the multiplicand is the value of the capital stock, the multiplier—the average of the three fractions—does not represent value at all. When a figure representing value of the capital stock or property is multiplied by another figure which does not represent value, the product is not the value of property. Multiplying the value of the capital stock by proportion of wages and gross receipts cannot produce a figure which represents the value of *property*. The product is a composit figure and represents the value of the privilege of doing business in Pennsylvania.

On page 14 of appellant's statement of jurisdiction a distinction is attempted to be made between a tax measured by property according to valuation and a tax measured by property not requiring a valuation. The decisions cited do not reach the full length of appellant's contention.

In *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331 (1940), this court sustained a tax under a Texas statute which imposed a franchise tax based upon the proportion of outstanding capital stock, surplus and undivided profits which the gross receipts from business done in Texas bore to total gross receipts.

Mention may also be made of an earlier decision in *Society for Savings* v. *Coite*, 73 U. S. (6 Wall.) 590 (1867), which sustained a tax upon deposits of a savings bank al-

though part of such deposits were invested in securities of the United States. Speaking of a tax measured by the amount of business done, this court said:

> "Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. * * *" (608)

In this *Quaker Oats Company* case property, although valued, played very little part in the computation of the tax base. In the numerators of the three fractions property in Pennsylvania amounted to only $22,440, wages paid in Pennsylvania amounted to $143,259, gross receipts in Pennsylvania amounted to $7,224,347. The tax base was determined almost entirely by activity and business done, and not by property owned, in Pennsylvania. It seems absurd, therefore, to call the franchise tax a tax on property rather than a tax on a franchise or a privilege.

The decisions in *Arrott's Estate,* 322 Pa. 367 (1936), and *Commonwealth* v. *Union Trust Company of Pittsburgh,* 345 Pa. 298 (1942), do not conflict with out contention.

In Arrott's Estate, decided before *Commonwealth* v. *Columbia Gas and Electric Corporation,* 336 Pa. 209 (1939), the question involved was defined by Chief Justice Kephart as follows:

> "The question to be determined is whether resident owners of stock of foreign corporations subject to the Franchise Tax Act are required to pay the four mill personal property tax imposed by the Four Mill County Act. The question is precipitated by the substitution of a franchise tax on foreign corporations for the privilege of doing business in this State for the capital stock tax heretofore exacted by the Capital Stock Tax Act. * * * (369)

After the decision in the *Columbia Gas and Electric* case, the *Arrott* case was reconsidered in *Commonwealth* v. *Union Trust Company of Pittsburgh*, 345 Pa. 298 (1942). The Supreme Court said:

> "• • • While, in Commonwealth v. Columbia Gas & Electric Corp., 336 Pa. 209, 8 A. (2d) 404, it was pointed out that the tax under the Act of 1935 is not a capital stock tax, being levied on a franchise or privilege and not on property or capital of the corporation, that case did not impair the ruling in Arrott's Estate, 322 Pa. 367, 185 A. 697, that there was such a close identity between the capital stock tax and the franchise tax that the owners of shares of stock in foreign corporations which paid the franchise tax were not obliged to pay a personal property tax on such shares, it being the general policy of the State to avoid double taxation. • • •" (307)

We have quoted at some length from the Pennsylvania statute and the opinions of the Supreme Court, because of the inconsistent assertions of the appellant that the Pennsylvania Franchise tax is a tax upon *property*. In particular, appellant's points (b) to (d) are based on the assumption that the tax is upon property.

The Supreme Court of Pennsylvania characterized appellant's argument as a "studied confusion of the essential differences between a *property* tax and a *franchise* tax" (p. 13).

(b)

The method of allocation provided in the Act of 1935 is not arbitrary or unreasonable.

In *Butler Bros.* v. *McColgan*, 315 U. S. 501 (1942), the statute imposed a tax upon net income derived from business done within the State, to be "determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and *situs of tangible property.*"

The percentage used in the assessment "was determined by averaging the percentages which (a) value of real and tangible personal property, (b) wages, salaries, commissions and other compensation of employees, and (c) gross sales, less returns and allowances, attributable to the San Francisco house bore to the corresponding items of all houses of appellant." (505)

In the opinion, Mr. Justice Douglas said:

> "We cannot say that property, pay roll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned by appellant from this unitary business. * * *" (509)

The statement in paragraph 3 at the end of appellant's point (b), that under the California statute involved in the *Butler Brothers* case the income from intangibles was "specifically allocated according to situs of intangibles," seems to us to be without foundation.

The ruling in the *Butler Brothers* case, we submit, covers the case at bar, unless there is merit in the distinction advanced by appellant, that in the *Butler Brothers* case the tax was imposed upon income, and not upon capital stock.

In reply to this distinction we submit:

(1) Appellant has offered no proof that the application of the Pennsylvania formula would be arbitrary or unreasonable because a portion of the capital stock rather than a portion of the net income was the tax base. "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed." (*Butler Bros.* v. *McColgan*, 315 U. S. 501, 507.)

(2) Appellant's contention is ultimately based upon the same assumption that the Pennsylvania tax is a tax upon property.

(3) Appellant incorrectly states that "capital stock representing property and assets value is selected as the basis of the tax." The tax base is not capital stock as such but a composite figure obtained by multiplying the value of the capital stock by fractions representing the proportion of wages paid and gross receipts obtained, as well as of tangible property in the State. This figure represents the value of the privilege of doing business in Pennsylvania.

(4) The State makes no presumption, such as appellant implied, "that capital or property is employed in the same ratio as business activities." The purpose of the Pennsylvania statute in employing the wages fraction and the gross receipts fraction in the formula, is to measure business activity to an extent that property might not measure it, in order to obtain a fairer valuation of the privilege or franchise to be taxed.

Furthermore, in *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, this court sustained a franchise tax based upon capital stock rather than on income. The tax statute there considered imposed "a franchise tax * * * based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures * * * as the gross receipts from its business done in Texas bears to the total gross receipts * * *."

In *Ford Motor Company* v. *Oklahoma Tax Commission*, 188 Okla. 78, 106 Pac. (2d) 803 (1940), an assessment was upheld which was made under an Oklahoma statute which imposed a franchise tax upon the proportion of the *capital stock* which *property* owned and *business* done in Oklahoma bore to total property owned and business done.

Appellant also relies much upon the ruling in *People ex Rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48, 129 N. E. 202 (1920), certiorari denied 256 U. S. 702.

In this case three judges concurred in the opinion, one judge concurred in the result and three judges dissented in this case. The statute in this case imposed a tax upon the proportion of income determined by the ratio of specified assets within the state to the aggregate of such assets everywhere. Bonds were not included in these assets, but the interest from the bonds was included in the income taxed. This decision, we submit, is directly contrary to the ruling of this court in *Butler Bros.* v. *McColgan,* 315 U. S. 501.

This court has frequently held that it is no objection that the measure of taxation is found in income produced, in part, from property, which in itself, is nontaxable, or from the receipts from interstate commerce which may not be taxed as such. (See *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 165; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 389.) Appellant's objection that the gross receipts fraction includes receipts from interstate transactions, will be considered under point (g) hereof.

(c)

Neither the Franchise Tax Act of 1935 nor the method of allocation used in this case imposes a tax upon property located outside of Pennsylvania.

As already shown, the Supreme Court of Pennsylvania has held that the Act of 1935 does not impose a tax upon property whose situs is beyond the limits of the State.

Thus in *Commonwealth* v. *Columbia Gas and Electric Corporation,* 336 Pa. 209 (1939), Chief Justice Kephart said:

> "• • • These fractions, as stated above, concern corporate activity. While they bear some relation to capital stock value, intrinsically they determine the tax-

able value of the corporate activity within this State rather than of the property located here. * * * It does not ascertain physical worth of assets located in this State, but arrives at a value which the functional or operating organic unit within this State possesses. It represents what the right to do business is worth. It must follow that the tax is not levied on property but on the franchise to do business measured by a taxable value secured through the application of the factors of gross receipts, tangibles and payrolls to the capital stock value. It is representative of the value of that very franchise." (221-222)

This court has frequently held that while a state may not tax property beyond its borders, it may measure a tax by capital stock which, in part, represents property outside the state.

Thus in *Kansas City, Memphis, & Birmingham Railroad Company* v. *Stiles,* 242 U. S. 111 (1916), Mr. Justice Day said:

"* * * while the state could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the state. * * *" (119)

In *Atlantic Refining Company* v. *Virginia,* 302 U. S. 22 (1937), Mr. Justice Brandeis said:

"* * * The value of the privilege acquired is obviously dependent upon the financial resources of the corporation. * * * Obviously, the power inherent in the possession of large financial resources is not dependent upon, or confined to, the place where the assets are located. Compare Great Atlantic & P. Tea Co. v. Grosjean, 301, U. S. 412, 81 L. ed. 1193, 57 S. Ct. 735, 112 A. L. R. 293. Great power may be exerted by the company in Virginia although it has little property located there. * * *"

In *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331 (1940), Mr. Justice Reed said:

> "In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason it is held that an entrance fee may be properly measured by capital wherever located. The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state. • • • " (336)

Other decisions to the same effect are:

Great Atlantic & Pacific Tea Company v. *Grosjean,* 301 U. S. 412, 424-425 (1937);

Underwood Typewriter Co. v. *Chamberlain,* 254 U. S. 113 (1920);

Bass, Ratcliff and Gretton v. *State Tax Commission,* 266 U. S. 271, 282 (1924).

Counsel for appellant repeatedly argues that the intangible assets included in the value of the capital stock have a business situs outside of Pennsylvania.

It is fundamental, however, that the business or commercial situs of intangible assets is irrelevant in applying the formula to determine the value of the franchise of a foreign corporation to do business in the taxing state.

The question as to the intangibles is not, where is their business situs, but whether they contribute to the activity carried on in the taxing state.

In *Ford Motor Co.* v. *Clark,* 100 F. 2d 515 (1938), the same stocks and government securities, as are involved in

this case, were held to be properly included in assessment of franchise tax.

Circuit Judge Sibley, for the Circuit Court of Appeals for the Fifth Circuit, said:

> "It is further argued that the United States bonds and stocks in foreign corporations owned by the taxpayer cannot reasonably be included in capital contributing to sales in Texas. The presumption is that all the property of a business corporation is useful in its business. It should not have it otherwise. The Ford Motor Company has no business except the making and selling of cars. *The securities can readily be used as a means of raising cash for working capital.* * * *" (518) (Italics ours).

This decision was affirmed by the Supreme Court under the title of *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331 (1940).

In *National Leather Co.* v. *Massachusetts,* 277 U. S. 413 (1928), Mr. Justice Sanford said:

> "For present purposes it may be assumed that the capital stocks of the two subsidiary companies had no situs in Massachusetts which brought them within the jurisdiction of that state for the purpose of imposing a direct property tax. * * * But here the statute does not impose any direct tax upon these stocks and, as construed by the Massachusetts court, merely treats them as assets employed by the petitioner in its business within the state, and therefore requires that they be included when the total assets so employed by it are computed for the purpose of arriving at the proportionate part of the value of its own capital shares—determined by comparing the assets employed in business within the state with the total assets wheresoever employed or located—on which the excise for the privilege of carrying on its business within the State is imposed." (422-423)

This last decision was cited with approval by Mr. Justice Reed in *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 335-336 (1940).

(d)

Appellant's analysis of Ford Motor Co. v. *Beauchamp*, 308 U. S. 331.

Appellant's analysis of this decision deals with accidents and not the essentials of this case.

Appellant does not suggest how the particulars of the Texas statute as recited by it, affect the principles laid down by this Court in the *Beauchamp* case.

The tax in Texas, as well as in this State, was a franchise tax for the privilege of doing business in the State. The *principles* by which the *tax base* was determined in the *Beauchamp* case are applicable to the case at bar, regardless of the rate of the tax or the duration of the right to do business.

(e)

The Act of 1935 and the tax imposed on appellant thereunder do not deny to it the equal protection of the laws.

No discrimination has been shown in either the purpose or the effect of the Act of 1935.

The Legislature did not enact the statute for the purpose of discriminating against foreign corporations.

No one contends that they did.

On the contrary, the purpose was to remove the discrimination against domestic corporations, which had previously existed.

This purpose was recognized and expressed by the court in *Commonwealth* v. *Columbia Gas and Electric Corporation*, 336 Pa. 209 (1939). Referring to the capital stock tax law, that court said:

> "• • • Under this arrangement foreign corporations, transacting a large part of their business

here, escaped their fair share of the tax burden. The assets of foreign corporations, so far as they were comprised of intangibles, were wholly free of tax notwithstanding that they have played an important part in the conduct of the company's local business. The old tax did not even reach all the tangible property of the enterprise located in this State. It made no attempt to value foreign corporations either as going concerns within this State, or as parts of going concerns which the foreign corporations had created through operations in this and other states. The discrimination under the old tax law was not only unfair, but operated unjustly in favor of foreign corporations and against domestic corporations, even though they might be similarly situated. • • •

"The legislature sought to remedy this condition by amending the law so that foreign corporations would pay substantially the same amount of tax as domestic corporations though the amount of the tax was arrived at by a different method. The new tax is more in keeping with the benefits received from this State. The tax base represents the value of their right to do business in this State." (215-216)

That no discrimination was made, follows from principles well settled by the decisions of this Court:

(1) A State may place a foreign corporation in a different class from domestic corporations for the purpose of taxation, and impose a different rate of tax upon the foreign corporation for the privilege of doing business within its territory:

Kansas City, Memphis, & Birmingham Railroad Company v. *Stiles*, 242 U. S. 111, 118 (1916);

Madden v. *Kentucky*, 309 U. S. 83, 87-88 (1940);

Concordia Fire Insurance Company v. *Illinois*, 292 U. S. 535, 547-548 (1934);

Kidd v. *Alabama*, 188 U. S. 730, 732 (1903);

Cheney Brothers Company v. *Massachusetts*, 246 U. S. 147, 157 (1918).

(2) The burden is on the party attacking the classification to negative every conceivable basis which might support it:

Madden v. *Kentucky*, 309 U. S. 84 (1940).

(3) Mathematical equivalence, or exact identity are not necessary:

Concordia Fire Insurance Company v. *Illinois*, 292 U. S. 535, 547-548 (1934).

(4) Only clear and hostile discriminations against particular persons or classes are prohibited:

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, 255 (1922);

Colgate v. *Harvey*, 296 U. S. 404, 436-437 (1935), overruled on other grounds in *Madden* v. *Kentucky*, 309 U. S. 83, 93 (1940).

(5) The absence of discrimination is conclusively shown by the fact that if appellant were incorporated under the laws of Pennsylvania, its tax to this Commonwealth would amount to more than *fourteen times the assessment made in this case.*

This comparison is calculated in the opinion of the trial court as follows:

> "• • • Domestic corporations are taxed at the rate of 5 mills upon the value of the capital stock. The foreign franchise tax imposes the same rate upon the privilege of doing business in the State. If the defendant had been a domestic corporation the capital stock tax would have been figured approximately as follows:
>
> $$\frac{35{,}766{,}852}{60{,}821{,}913} \times \$75{,}000{,}000$$
>
> which would result in a tax of $220,521.99." (243a)

The assessment as recalculated in the judgment of the court below was $16,637.38 (253a).

In *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940), Mr. Justice Reed said:

> "• • • Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

(6) The cases of *Southern Railway Company* v. *Greene*, 216 U. S. 400 (1910) and *Hanover Fire Insurance Company* v. *Carr*, 272 U. S. 494 (1926), cited by the appellant, are clearly distinguishable in the case at bar, because —

(a) In each of these cases the tax imposed upon the foreign corporation amounted to a *clear discrimination*. In the *Southern Railway Company* case domestic and foreign corporations had been subject to a franchise tax at the same rate, and then the Legislature provided for an additional annual franchise tax by foreign corporations only. In the *Hanover Fire Insurance Company* case the domestic insurance corporation paid a tax on the assessment of personal property at a valuation reduced to one-half of 60% of the value of the property, whereas the foreign insurance corporation was required to pay a tax at the same rate but imposed upon 100% of its net receipts.

(b) In each case the foreign corporation had invested a large amount of money in property devoted to a limited and special use and not readily available for other uses. In the *Southern Railway Company* case the company had purchased and built and improved lines of railroad which connected with other lines owned by it. This case is distinguished in *Cheney Brothers Company* v. *Massachusetts*,

246 U. S. 147, 157 (1918), and in *Northwestern Mutual Life Insurance Company* v. *Wisconsin*, 247 U. S. 132, 140 (1918). In this last case this court said:

> "• • • In that case we laid stress upon the fact that the tax related to railroad property not susceptible of other uses, which, placed in the state, had to remain there permanently, and could not be withdrawn at the pleasure of its owners. Under such circumstances, and dealing with that character of property, we held that the particular tax constituted such discrimination as to deny to the company the equal protection of the laws. • • •" (140)

In the *Hanover Fire Insurance Company* case the company had done business in Illinois for a number of years and had built up a large business and good will and had many agents and extensive records there. In this last case, however, Chief Justice Taft said:

> "• • • We have said in Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. ed. 632, 38 Sup. Ct. Rep. 295, and in Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 118, 61 L. ed. 176, 187, 37 Sup. Ct. Rep. 58, that a state does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and that a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants them; • • •" (514-515)

In the *Cheney Bros. Co.* case, the fact that the foreign corporation had made a very substantial investment—$175,000—in lands and buildings for an auto service station and garage did not prevent the State of Massachusetts from increasing its annual license fee.

(f)

Neither the Act of 1905 nor the assessment of tax against the appellant thereunder impairs the obligation of contract.

Appellant contends that a contract was created between itself and the Commonwealth of Pennsylvania by Section 1010 of the Pennsylvania Business Corporation Law of May 5, 1933, P. L. 364, 15 P. S., Section 2852-1010, which provides as follows:

> "A foreign business corporation which shall have received a certificate of authority under this act, *so long as such certificate of authority shall not be revoked or cancelled,* shall enjoy the *same rights and privileges as a domestic business corporation, but no more,* and, except as in this act otherwise provided, shall *be subject to the same liabilities, restrictions, duties* and penalties now in force or hereafter imposed upon domestic business corporations, to *the same extent as if it had been organized under this act* to transact the business set forth in its certificate of authority." (Italics ours.)

Our position is that no impairment of the obligation of contract has resulted, because —

(1) *Section 1010, above quoted, even if it embodies a contract between the appellant and the Commonwealth, does not confer the same rights or impose the same liabilities on a foreign corporation in the matter of taxation:*

The peculiar wording of this section distinguishes it from analogous clauses which have been employed in statutes or constitutions of other states. What is peculiar is the language:

> "• • • *to the same extent as if it had been organized under this act to transact the business set forth in its certificate of authority.*" (Italics ours.)

These words, we submit, define what is meant by the "same rights and privileges" and the "same liabilities."

The language means the rights and liabilities which would be conferred if the foreign corporation had been organized under this act, namely, the Business Corporation Code. It means the rights conferred and liabilities imposed by this elaborate Business Corporation Code itself.

The language does not mean every right or liability which might be created under any existing law of the Commonwealth.

This, we submit, is what Section 1010 means, and is all that it means. Section 1010 does not mean that the foreign corporation must be subject to the same identical liabilities as the domestic corporation in the matter of taxation, because the problem of the state in taxing a foreign corporation is very different from the problem of taxing a domestic corporation. This has been recognized in many decisions of the Supreme Court of this State and also by the Supreme Court of the United States, which hold that a state may place the domestic and foreign corporations in different classes for the purpose of taxation.

In *Commonwealth* v. *The American Gas Company*, 54 Dauph. 115 (1943), Judge Hargest of the Common Pleas of Dauphin County said:

> "The Business Corporation Law is a regulatory Act; it is not a taxing statute; and we are of opinion that the words 'liabilities, restrictions, duties and penalties' in that act have no reference to taxation." (152)

In the opinion of the court of Common Pleas, in this case, Judge Hargest also said:

> "We do not understand that the Business Corporation Law deprives the State of its well-recognized power to differently classify foreign and domestic cor-

porations for taxation, provided there is no arbitrary discrimination against one class or the other. * * *" (243a)

Section 1010 of the Business Corporation Code does not say that the rate of taxation shall not be changed or be identical with the rate charged to domestic corporations, but only that the foreign corporation shall enjoy the same rights and privileges as a domestic corporation.

Hence, so long as the foreign corporation does not pay higher taxes than does the domestic corporation, the foreign corporation had no ground for complaint.

If this interpretation is correct, there has been no impairment of the obligation of the alleged contract sought to be derived from Section 1010 and the record presents no Federal question of impairment of obligation of contract.

(2) *The alleged contract would not be impaired because the tax liability of the appellant in this case is far less than it would have been if it had been organized under this Business Corporation Law of 1933.*

The contract right "to the same liabilities" as if appellant "had been organized under this act" would not be violated by the assessment made in this case, which was less than one-fourteenth of the assessment that would have been made against the appellant if it had been organized under the Pennsylvania Code. See the calculations above under (5) of point (e) and page 253a of the printed record in the Supreme Court of Pennsylvania.

(3) *Section 1010 did not create a contract between the appellant and the Commonwealth.*

(a) *The certificate of authority issued to the appellant under Section 1010 conferred only a revocable license:*

Connecticut Mutual Life Insurance Company v. *Spratley*, 172 U. S. 602, 620 (1899);

Doyle v. *Continental Insurance Company*, 94 U. S. 535, 540-541 (1877);

Home Insurance Company of New York v. *Augusta, Georgia*, 93 U. S. 116, 120, 122 (1876);

Commonwealth ex rel. Baldrige v. *Sun Oil Co.*, 294 Pa. 99, 105 (1928);

Rule v. *Price*, 323 Pa. 139, 143-144 (1936).

(b) *The right or license which appellant secured under Section 1010 was made expressly revocable.*

The right was to continue only "so long as the certificate of authority shall not be revoked or canceled."

Section 1010 states unqualifiedly that the certificate of authority is to continue only so long as it shall not be revoked or canceled.

The Commonwealth, which granted the license, has the sole power to "revoke" or "cancel" the license.

This provision is wholly inconsistent with the existence of a contract.

(c) *It is an elementary rule of the law of contracts that if one party reserves the right to cancel, the proposed agreement is void for lack of mutuality.*

Thus in *1 Williston on Contracts*, Section 105, page 365, the author states:

> "• • • As has been seen an agreement which the party reserves the right to cancel at his pleasure cannot create a contract."

In *Ellis* v. *Dodge Bros.*, 237 F. 860, 867 (1916), a contract by a manufacturer granted a license to a dealer to sell cars, but provided that the contract might be cancelled by either party at any time upon fifteen days' notice.

The court held that the dealer's administrator could not recover at all on the contract, saying:

> "• • • Even if there were an agreement here on the part of the Dodge Bros. to deliver the cars, this right to cancel would seem to nullify any such agreement. To agree to do something and reserve the right to cancel the agreement at will is no agreement at all."

Other decisions to the same effect are:

Interstate Iron & Steel Co. v. *Northwestern Bridge & Iron Co.*, 278 F. 50 (1922);

Velie Motor Car Co. v. *Kopmeier Motor Car Co.*, 194 F. 324 (1912);

City of Pocatello v. *Fidelity & Deposit Co. of Maryland*, 267 F. 181 (9th C.C.A. 1920);

Williston on Contracts (Rev. ed.), Section 43, page 126.

Any right which appellant could obtain under Section 1010 would be revocable under the reserved power contained in the Pennsylvania Constitution.

Section 1010 confers upon a foreign corporation—

> "• • • the same rights and privileges as a domestic business corporation, but no more • • •."

Therefore, if a domestic corporation could only secure a revocable right to do business in this State, the same must be true of a foreign corporation registering under Section 1010.

The license or right of a domestic corporation and therefore of a foreign corporation, was subject to the right of the General Assembly to alter, revoke or annul under Article XVI, Section 10 of the Pennsylvania Constitution.

Article XVI, Section 10 provides:

> "The General Assembly shall have the power to alter, revoke or annul any charter of incorporation

> now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. * * *"

The domestic corporation has only a revocable right to do business, and the foreign corporation is expressly given the same right, but no more.

Clearly the right of a foreign corporation to do business in this state is thereby made revocable at any time.

Again, the foreign corporation—

> "* * * shall be subject to the same liabilities, restrictions, duties, * * *" etc.

imposed upon domestic business corporations, to the same extent as if the foreign corporation had been organized under the Business Corporation Code.

The franchise of a domestic corporation is subject to the definite "restriction" that it may be revoked at any time by the Legislature. The foreign corporation is expressly made subject to the same restriction as a domestic corporation. To make the language more certain, Section 1010 expressly declares that the foreign corporation shall be subject to the same restrictions, etc., "as if it had been organized under this act," as a domestic corporation.

As the contract right asserted by appellant may be revoked by the Legislature at any time, such right does not amount to a contract at all.

In *Hammond Packing Company* v. *Arkansas,* 212 U. S. 322 (1909) (quoted in appellee's brief, page 80), the Arkansas constitution (Article 12, Section 111) authorized foreign corporations to do business in the State, subject

to the same regulations and with the same rights as those enjoyed by domestic corporations.

Article 12, Section 16 of the same constitution contained a provision similar to Article XVI, Section 1010 of the Pennsylvania Constitution, authorizing the Legislature to repeal charters provided that "no injustice shall be done to incorporators."

The Supreme Court of the United States held that in view of this clause a foreign corporation obtained no contract right.

Mr. Justice White said:

> "* * * *The claim of an irrepealable contract cannot be predicated upon a contract which is repealable.* * * *" (345-346) (Italics ours.)

The Legislature of Pennsylvania did not intend that a foreign corporation should have a better right and pay less taxes in proportion than a Pennsylvania corporation.

(d) *The reserved power to revoke may be exercised by any general law amending or changing Section 1010, and without first enacting a statute expressly revoking the license or charter.*

Hammond Packing Company v. *Arkansas*, 212 U. S. 322, 345-346 (1909);

Phillips Petroleum Co. v. *Jenkins*, 297 U. S. 629, 635 (1936);

Wagner Free Institute v. *Philadelphia*, 132 Pa. 612 (1890);

The Iron City Bank v. *The City of Pittsburgh*, 37 Pa. 340 (1860).

In *Town of Southington* v. *Southington Water Co.*, 80 Conn. 646, 69 Atl. 1023 (1908), the Supreme Court of Connecticut said:

"* * * Amendments or alterations of charters may result from the operation of general laws, as well as from special legislation addressed to the corporation in question. * * *" (1026)

The courts have held that the mere passage of a later statute inconsistent with the charter is sufficient act of revocation, without any notice. The State need not first give some notice or form of revocation. The later tax or other statute need not refer to the charter at all.

(e) *The power of the Commonwealth to revoke a certificate or authority of a foreign corporation under the language of Section 1010—"so long as such certificate of authority shall not be revoked or cancelled"—is not limited or restricted by Section 1013 of the Business Corporation Code.*

Section 1013 provides:

"Whenever the Department of State shall find that a foreign business corporation, authorized by a certificate of authority to do business in this Commonwealth, is engaged in this Commonwealth in any business which it is not authorized to transact by its certificate of authority or by any amended certificate of authority, or has changed its name or the location of its registered office without first securing an amended certificate of authority, as required by this act, or is violating any of the laws of this Commonwealth, the Department of State shall give notice by registered mail to such corporation that such default exists and that its certificate of authority, including any amendments thereto, will be revoked and cancelled unless such default shall be cured within thirty days after the mailing of such notice. If such default shall not be cured within such period of thirty days, the Department of State shall revoke and cancel the certificate of authority of such foreign corporation, including any amendments thereto. * * *"

That Section 1013 does not limit or restrict the authority to revoke in Section 1010 is shown by the following:

(1) The power to revoke conferred in Section 1013 is only the power which is given to the Department of State. Nothing is said about the power of the Legislature to revoke or amend.

(2) The purpose of Section 1013 is to provide for an administrative supervision of a foreign corporation to keep it within the bounds of its certificate of authority and within the laws of this Commonwealth.

Section 1013 permits a revocation by the Department of State only in cases where the foreign corporation (1) engages in a business not authorized by its certificate, or (2) changes its name or location without first securing an amended certificate, or (3) violates a law of the Commonwealth.

These few cases, however, do not constitute an exhaustive enumeration of the causes of revocation. There is no intention shown that these causes are the sole and exclusive causes for revocation. If they were such, the Commonwealth could not revoke a certificate of authority if a corporation should cease to do business or become defunct, or be unable to pay or defaulted in paying its Pennsylvania corporation taxes. These and numerous other grounds still exist for the revocation of a certificate of authority.

(3) Section 1013 does not, in terms or in reason, limit the reserve power of the Legislature "to alter, revoke or annul."

Nothing in the section shows any intention to deprive the Legislature of this essential power. In fact, this reserved power of the Legislature is created by the Constitution and could not be limited by the Legislature. Even without the language in Section 1010, appellant's certificate of authority is revocable.

(4) Section 1010 does not in any way refer to Section 1013, and therefore is not limited by it.

Section 1010 does not say "so long as not revoked or cancelled"—

by the Department of State
or
as provided in Section 1013 for causes herein
or
in this Act provided.

(f) *Nothing in Section 1010 or in the Business Corporation Code generally, was intended to deprive the Legislature of its well-recognized power to place foreign and domestic corporations in classes for the purpose of taxation.*

Section 1010 does not mention taxation at all. Its language is not sufficient to confer upon foreign corporations an exemption or a more favorable return of taxation than domestic corporations enjoy.

We repeat, Section 1010 gives a foreign corporation "the same rights and privileges as a domestic corporation, but no more."

(4) *The failure to deduct from the multiplicand or capital stock value of foreign corporations certain intangible assets which are deducted from the appraised value of the capital stock of domestic corporations, does not impair the obligation of contract or deny the equal protection of the laws.*

Section 1 of the Act of June 22, 1931, P. L. 687, 72 P. S. Section 1894 (Pocket Part), provides:

> "Whenever any corporation, limited partnership, joint-stock association, or company, incorporated or formed under the laws of this Commonwealth, and liable to the payment of tax upon its capital stock, or

specifically exempted therefrom under the laws of this Commonwealth, shall own, either directly, or through subsidiary or sub-subsidiary corporations, a majority of the total issued and outstanding shares of voting stock of any corporation, limited partnership, joint-stock association or company, then, in such cases, so much of the value of all shares of stock, so owned in such other corporation, limited partnership, joint-stock association, or company, as represents property or assets located or having a legal situs without this Commonwealth, shall not be liable to taxation, under the laws of this Commonwealth providing for the taxation of capital stock of corporations, limited partnerships, joint-stock associations, and companies, but shall be excluded in determining the value of the capital stock of such owning company for purposes of taxation."

This provision as to domestic corporations, however, does not violate the requirement of equality, because—

(1) It is well established by decisions of this court and of the Supreme Court of the United States that the Legislature may place foreign corporations in a different class from domestic corporations for the purpose of taxation.

(2) As the Legislature may so classify them differently, it may also impose upon foreign corporations a different tax from that imposed upon domestic corporations, provided no unreasonable discrimination results against the foreign corporations.

See *Kidd* v. *Alabama*, 188 U. S. 730 (1903).

Furthermore, the reason for granting a deduction or exemption of certain government securities and stocks of subsidiaries in taxing a domestic corporation, did not apply to a franchise tax upon foreign corporations.

The Pennsylvania Capital Stock Tax was a tax upon property and could not have been applied to the government securities. Further, only such proportion, not all, of

the value of stocks of subsidiary companies as represents assets located without the Commonwealth, is deducted under the Capital Stock Tax Law.

The franchise tax, however, is not a tax upon property, and would not be imposed upon such government securities, or stocks of subsidiaries, as such, but such securities and stocks were considered only along with all other assets of the foreign corporation in determining the value of a franchise or privilege to do business in Pennsylvania. The same reasons which support the consideration of the value of tangible property outside of Pennsylvania in the formula to determine the value of the franchise, also justify the consideration of the government securities and the stocks, instead of deducting or exempting the same.

The capital stock tax is imposed upon all of the assets of a domestic corporation, including intangibles, excepting the intangibles deducted in accordance with the Act of June 22, 1931, and tangible property outside of the State. The franchise tax upon foreign corporations, however, is imposed only upon a proportion or percentage—4.4% in the case of appellant—of the value of the total capital stock.

The average percentage resulting from the three allocating fractions amounts to .044434. (162a)

A foreign corporation unquestionably has still, in spite of the franchise tax amendment of 1935, a comparative advantage over domestic corporations in the matter of taxation, because its tax is calculated upon 4.4% only of the capital stock value.

As stated in the decisions of this court, the burden was upon appellant to prove that a greater tax burden in fact was imposed upon a foreign corporation than upon a domestic corporation. This it has wholly failed to do.

(g)

(g)

The Act of 1935, as construed by the State courts, does not unlawfully burden interstate commerce.

Appellant contends that of the $7,224,347 of sales, $7,052,574 were made in interstate commerce and should have been excluded from the numerator of the third fraction which represents gross receipts.

Section 21 (b) of the Act of May 16, 1935, P. L. 184, 72 P. S. Section 1871 (Pocket Part), defines "gross receipts" as follows:

> "The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be the amount of its gross receipts for the taxable year from, (1) sales, except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the taxpayer outside the Commonwealth, and sales otherwise determined, by the Department of Revenue, to be attributable to the business conducted on such premises * * *."

The Court of Common Pleas (Pa. Rec. 234-237) and the Supreme Court (350 Pa. at page 259) found that all of the sales in question were included within the term "gross receipts" in the statute quoted.

It is, therefore, unnecessary to recite the particulars of appellant's business, except as they bear upon the question of a possible violation of the Commerce Clause.

The total sales were made up as follows: (21st Find., 221a) —

(1) Sales to Pa. Customers on orders filled from stocks in Pa.	$ 171,773
(2) Sales to Pa. customers on orders filled from stocks outside of Pa.	5,341,783
(3) Sales to customers outside of Pa. delivered from stocks in Pa.	14,815

(4) Sales to customers outside of Pa. delivered from stocks outside of Pa. 1,710,769

The above description of these four classes, however, does not indicate the full extent of the activity in Pennsylvania.

The trial court found, and appellant does not deny, that all of these sales "were negotiated by Pennsylvania agents" (235a). The order for all of these sales were secured by salesmen working out of the two offices which appellant maintained in Pennsylvania.

In addition, all of these sales were closed in Pennsylvania and the sales price was collected by the offices in Pennsylvania and deposited in Pennsylvania banks to the credit of appellant (236a, 99a).

Sales were of two kinds: package sales and bulk sales.

In negotiating *package* sales the salesman secures an order from the customer and this order is forwarded to the Chicago office. There the credit department may either approve or reject the credit of the customer. Then the sales department approves or disapproves the price. If the Pittsburgh office does not hear from Chicago within two days, it is entitled to treat the order as accepted.

Only "a very small percentage" of such orders were disapproved or rejected by the Chicago office (89a-90a).

When an order for *bulk* goods is secured from a customer this order blank is sent to the Chicago office and if the Pittsburgh branch receives confirmation of the order a formal contract is prepared by the office in Pennsylvania and executed there.

Only a "comparatively small" percentage of the total orders sent to Chicago are contract orders (101a), and only a "small percentage" of contract orders are not approved (95a).

In the exceptional case where the credit department or

the sales department disapproves an order, it merely exercises a power of veto. The credit department consults its files and ascertains the credit standing of the customer. The sales department checks the price and the time of delivery.

None of these activities has anything to do with the contacting of the customer or securing the order or the closing of the sale. A credit manager and the sales manager in Chicago might function perpetually, but they would never sell a pound of goods. It is the Pennsylvania office which gets the business and closes the business. The action in Chicago was purely negative. The only affirmative activity throughout the whole business of selling is that of the agents of the Pennsylvania office. They are the procuring cause of the sale.

Appellant did not offer proof to show what proportion of its sales were package sales or bulk sales. Therefore, if either package or bulk sales were properly included in the computation, the assessment should be sustained.

The first class — sales to Pennsylvania customers on orders filled from stocks in Pennsylvania — were intrastate sales. The second class — sales to Pennsylvania customers on orders filled from stocks outside of Pennsylvania — seems to be identical with the class of sales which were held properly subject to a gross receipts tax in *Department of Treasury of State of Indiana* v. *Allied Mills*, 220 Ind. 340, 42 N. E. (2d) 34, affirmed per curiam in 318 U. S. 340, and followed in *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 346 (1944).

However, the Pennsylvania tax is not a tax upon gross receipts, but is a franchise tax upon the privilege of doing business in that state.

Under the decisions of this court it is clear, we submit, that all four classes of these sales in interstate commerce

were properly included and used as a measure in computing the franchise tax.

Not all, but only part of the gross receipts, used in the computation were receipts from interstate commerce.

Furthermore, gross receipts from interstate commerce are used as a measure only in one of three fractions in computing the amount of the tax. No tax is imposed upon gross receipts from interstate commerce as such.

The applicable rule will be found in such decisions as:

International Shoe Company v. *Stratton Shartel*, 279 U. S. 429 (1929);

Hump Hairpin Manufacturing Company v. *Emmerson*, 258 U. S. 290 (1922);

Baltic Mining Company v. *Massachusetts*, 231 U. S. 68 (1913);

Western Cartridge Co. v. *Emmerson*, 281 U. S. 511 (1930);

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 (1938).

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Attorney General.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 873

THE QUAKER OATS COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Now comes the appellee, the Commonwealth of Pennsylvania and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial Federal question, and it further moves that, if the motion to dismiss be not granted, this court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument. In support of this motion the appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

H. F. STAMBAUGH,
Special Counsel.
JAMES H. DUFF,
Attorney General.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 872

FORD MOTOR COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

No. 873

THE QUAKER OATS COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

APPEALS FROM THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR REHEARING ON MOTION TO DISMISS OR AFFIRM

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INDEX

Table of Contents

	Page
Orders of the Court	1
Basis of Request for Rehearing	2
The Nature of the Tax	3
The Reasonableness of the Method of Allocation and the Taxation of Property Outside the State	7
The Equal Protection of the Laws	7
Impairment of the Obligation of Contract	12
Interstate Commerce	15
Conclusion	17
Certificate of Counsel	18

Table of Cases Cited

Airway Corp. v. *Day*, 266 U. S. 71	10
Aluminum Co. of America v. *Evatt*, 140 Oh. St. 385, 45 N. E. (2d) 118	17
American Smelting & Refining Co. v. *Colorado*, 204 U. S. 103	12
Arrott's Estate, 322 Pa. 367, 185 Atl. 697	6
Bass, Ratcliff & Gretton v. *Tax Commission*, 266 U. S. 271, 280	3
Butler Bros. v. *McColgan*, 315 U. S. 501	7
Commonwealth v. *Columbia Gas & Electric Corp.*, 336 Pa. 209, 8 A (2d) 404	6
Commonwealth v. *Ford Motor Company*, 350 Pa. 236 38 A (2d) 329	6

PAGE

Commonwealth v. *New York, Pennsylvania & Ohio R. R. Co.*, 188 Pa. 169, 41 Atl. 594 7

Commonwealth v. *The Quaker Oats Company*, 350 Pa. 253, 38 A (2d) 325 6

Commonwealth v. *The Union Trust Company of Pittsburgh*, 345 Pa. 298, 27 A (2d) 15 6

Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77 14

Cream of Wheat Co. v. *Grand Forks*, 253 U. S. 325 . 11

Cudahy Packing Co. v. *Minnesota*, 246 U. S. 450 16

Delaware, Lackawanna & Western R. R. Co. v. *Pennsylvania*, 198 U. S. 341, 356, 357, 358 6

Educational Films Corp'n v. *Ward*, 282 U. S. 379 .. 3, 8

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 165 ..... 3, 8

Ford Motor Company v. *Beauchamp*, 308 U. S. 331 .. 7

Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494. 8, 11

Higginbotham v. *Baton Rouge*, 300 U. S. 535, rehearing denied in 307 U. S. 649 14

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290 . 17

Irving Trust Co. v. *Day*, 314 U. S. 556 14

Kansas City, Ft. S. & M. Co. v. *Kansas*, 240 U. S. 227. 10

Kansas City, Memphis & Birmingham R. R. Co. v. *Stiles*, 242 U. S. 111 ..... 9, 10

Matson Navigation Co. v. *State Board*, 297 U. S. 441 . 17

Newark Fire Ins. Co. v. *State Board*, 307 U. S. 313 .. 11

Northwestern Mutual Life Ins. Co. v. *Wisconsin*, 247 U. S. 132 ..... 9, 10

Phelps v. *Board of Education*, 300 U. S. 319, 322-3 ...13, 14

PAGE

Roberts & Scheafer Co. v. *Emmerson*, 271 U. S. 50 ... 10

Society for Savings v. *Coite*, 73 U. S. (6 Wall.) 590 .. 7

Southern Railway Co. v. *Greene*, 216 U. S. 400 ..... 8, 11

State Highway Route No. 72, 265 Pa. 369, 108 Atl. 820 5

United States Express Co. v. *Minnesota*, 223 U. S. 335 16

Western Live Stock v. *Bureau*, 303 U. S. 250, 256..15, 16, 17

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1 10

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193 11

TABLE OF STATUTES CITED

Act of May 16, 1935, P. L. 184, 72 Purdon's Statutes, sections 1901, 1902, 1871, 1891, 1892a-1892d. This Act is referred to elsewhere herein as the Act of 1935 3

Act of May 16, 1935, P. L. 208, 72 Purdon's Statutes, sections 3420a-3420n 4

Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes, sections 2852-1010 12

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APPEALS FROM THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR REHEARING ON MOTION TO DISMISS OR AFFIRM

On March 12, 1945, this Court handed down the following order in No. 872:

> "Per curiam: The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) Flint v. Stone Tracy Co., 220 U. S.

107, 165; Educational Films Corp'n. v. Ward, 282 U. S. 379; Ford Motor Co. v. Beauchamp, 308 U. S. 331; Butler Bros. v. McColgan, 315 U. S. 501; (2) Kansas City, Memphis & Birmingham R. R. v. Stiles, 242 U. S. 111; Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132; (3) Phelps v. Board of Education, 300 U. S. 319, 322-3."

On March 12, 1945, this Court handed down the following order in No. 873:

> "Per curiam: The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) Flint v. Stone Tracy Co., 220 U. S. 107, 165; Educational Films Corp'n. v. Ward, 282 U. S. 379; Ford Motor Co. v. Beauchamp, 308 U. S. 331; Butler Bros. v. McColgan, 315 U. S. 501; (2) Kansas City, Memphis & Birmingham R. R. v. Stiles, 242 U. S. 111; Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132; (3) Phelps v. Board of Education, 300 U. S. 319, 322-3; (4) Western Live Stock v. Bureau, 303 U. S. 250, 256, and cases cited."

Basis of Request for Rehearing

Appellants respectfully request this Court to reconsider its orders dismissing the above appeals for want of a substantial federal question. The basis of this request is that the cases relied upon by it are not decisive of the issues raised in the appeals. There are a number of differences between those cases and the instant cases which warrant this Court in taking or noting jurisdiction of the present appeals in order to decide the merits of the issues raised therein.

These differences and the application of the cases relied upon by this Court to the issues raised in the appeals will now be discussed.

The Nature of the Tax

Appellants contended that the Act of May 16, 1935, P. L. 184, (72 Purdon's Statutes, sections 1901, 1902, 1871, 1891, 1892a-1892d) imposed a tax on the property of foreign corporations, and that in the settlements of tax against appellants their property outside of Pennsylvania was taxed. The Supreme Court of Pennsylvania held that the tax was imposed on the franchise for the privilege of doing business in Pennsylvania. *Appellee in its Motion to Dismiss or Affirm did not contend that this issue had been decided by this Court or that it did not present a substantial federal question.*

In dismissing this issue, this Court cited *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165, and *Educational Films Corp'n.* v. *Ward*, 282 U. S. 379. In both these cases this Court took jurisdiction in order to determine the nature of the tax and announced the well settled principle that it is not bound by the characterization given a tax by lower courts and the lawmaking power or relieved from the duty of considering the real nature of the tax from its operations and incidents.

Therefore, these cases are directly applicable to, and are decisive of, the issue as to the nature of the tax in the instant cases *only if there are no substantial differences between those cases and the instant cases*—but it is submitted that these cases are not controlling in the instant cases because of the following substantial differences:

In the *Flint* case, an Act of Congress was involved. In the *Ward* case, the statute at issue was an amendment to a prior statute of the State of New York which had previously been construed by this Court in *Bass, Ratcliff & Gretton* v. *Tax Commission*, 266 U. S. 271, 280, in accordance with the interpretation thereof by the Federal Court and the state

courts. In both cases, the tax was based upon or measured by net income, and *the statute involved contained an express legislative declaration as to the character of the tax.*

The Act of Congress imposed tax on every corporation, joint stock company, or association or insurance company,

> "with respect to the carrying on or doing business by such corporation * * *."

The New York amending statute imposed tax on every domestic corporation of certain classes,

> "for the privilege of exercising its franchise in this state in a corporate or organized capacity."

In the instant cases:

(a) The statute does not contain any express legislative declaration as to the character of the tax or any change in the subject matter of the tax. It is not stated anywhere *in the body of the statute* that the subject matter of the tax is the franchise granted to foreign corporations for the privilege of doing business in Pennsylvania. The tax is imposed on "the taxable value" which is the part of the whole actual cash value of the capital stock allocated to Pennsylvania. The legislature knew how to express such a legislative intent because in another statute enacted on the same date, to wit, the Corporate Net Income Tax Act of May 16, 1935, P. L. 208, (72 Purdon's Statutes, sections 3420a-3420n), it provided in Section 3 as follows:

> "Every corporation shall be subject to, and shall pay *for the privilege of doing business in this Commonwealth,* a state excise tax at the rate of six per centum upon each dollar of net income of such corporation." (Italics ours.)

The only reference in the Pennsylvania statute to a franchise tax is in the *title* thereof (not in the statute itself)

where it is stated that there is being substituted "a franchise tax on foreign corporations in lieu of the capital stock tax on such corporations."

In the instant cases, therefore, the title of the statute contains a reference to a franchise tax on foreign corporations but the body of the statute makes no reference to the proposed change, and does not, in terms, impose the tax on any franchise of foreign corporations. Under these circumstances, the Supreme Court of Pennsylvania held, in the case of *State Highway Route No. 72,* 265 Pa. 369, 108 A. 820, *that the title of a statute "cannot give validity to a subject omitted from the body of an Act."* In that case, the court said at page 374:

> "The title of the Act of 1911 (P. L. 468), includes, inter alia, a clause, 'providing for the payment of damages in taking of property, or otherwise, in the improvement thereof (of highways).' And appellants earnestly contend that the use of the words, 'or otherwise' in the title shows an intent to impose upon the Commonwealth liability for all damages resulting from improvement of State highways, including change of grade, and that the act should be so construed. Such contention cannot be accepted. The liability is imposed by the enacting clause, not by the title; while the latter is regarded as a part of the statute and may properly be considered in its construction (Halderman's App., 104 Pa. 251, 259; Eby's App., 70 Pa. 311, 314; Pennsylvania R. R. Co. v. Riblet, 66 Pa. 164; Yeager v. Weaver, 64 Pa. 425, 428; Brink v. Marsh, 53 Pa. Superior Ct. 293); yet the title cannot give vitality to a subject omitted from the body of the act; for while a statute cannot be broader than its title, the title may be broader than the statute; if so, the latter must control."

(b) In Section 21(c) of the statute, it is provided that *domestic and foreign corporations* liable to tax under Section 21(b),

> "shall not be required to pay any *further* tax on the mortgages, bonds, and other securities owned by them * * *." (Italics ours.)

This language is indicative of a property tax.

(c) The opinions of the Supreme Court of Pennsylvania are inconsistent on the question as to the nature of the tax imposed on foreign corporations under the Pennsylvania statute. In the instant cases, 350 Pa. 253, 38 A. (2d) 325, *(The Quaker Oats Co.)*, 350 Pa. 236, 38 A. (2d) 329 *(Ford Motor Company)*, and in *Commonwealth* v. *Columbia Gas & Electric Corporation*, 336 Pa. 209, 8 A. (2d) 404, it held that the tax was on the franchise for the privilege of doing business; but in *Arrott's Estate*, 322 Pa. 367, 185 Atl. 697, and in *Commonwealth* v. *The Union Trust Company of Pittsburgh*, 345 Pa. 298, 27 A. (2d) 15, it held that the tax was in effect a property tax.

(d) The Pennsylvania statute at issue amended a prior statute which imposed a tax on the capital stock of both domestic and foreign corporations, and which had been construed by this Court in *Delaware, Lackawanna & Western R. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 356, 357, 358, as imposing a property tax. Under the amending statute of 1935, "the actual cash value of capital stock" continued to be the basis of the tax for both classes of corporations. The tax on domestic corporations remained unchanged and the only change made in the taxation of foreign corporations was in the method of allocation of their capital stock value.

(e) Under the statute, the basis of the tax, to wit, "the actual cash value of the whole capital stock," is determined

by an appraisal and valuation of all property and assets including bonds, mortgages, moneys at interest, franchises, privileges and good will. See *Commonwealth* v. *New York, Pennsylvania & Ohio R. R. Co.*, 188 Pa. 169. This is indicative of a property tax. See *Society For Savings* v. *Coite*, 73 U. S. (6 Wall.) 590.

Wherefore, by reason of these substantial differences between the two cases cited by this Court and the instant cases, it is submitted that this Court should take or note jurisdiction of the present appeals in order to determine the issue as to the nature of the tax.

The Reasonableness of the Method of Allocation and the Taxation of Property Outside the State

In their Briefs in Reply to Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, appellants discuss these two issues and distinguish the cases of *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, and *Butler Bros.* v. *McColgan*, 315 U. S. 501, relied upon by this Court in dismissing the appeals in so far as these issues are concerned. (Ford Motor Company, pages 16 to 34; The Quaker Oats Company, pages 15 to 33.)

For the reasons given and the distinctions made there, appellants respectfully submit that this Court should take or note jurisdiction of the two appeals in order to determine these issues on the merits.

The Equal Protection of the Laws

Appellants own United States securities and shares of subsidiary corporations. Prior to 1935, such investments when owned by either domestic or foreign corporations were not taxed. Under the Act of 1935 as construed, these investments were included in the computation of the tax on

appellants and increased the tax of each appellant by $18,972.94 (Ford Motor Company) and $4,537.61 (The Quaker Oats Company) but such investments were exempted from tax when owned by domestic corporations of the same kind. Although the tax rate on domestic and foreign corporations under the Act of 1935 is the same, the tax rate on domestic corporations is actually lower because of the allowance of exemptions which are denied to foreign corporations. Thus a greater tax burden on comparable capital is imposed on foreign than on domestic corporations. Appellants contend that this difference in treatment between them and domestic corporations of the same kind denies to them the equal protection of the laws on the authority of the cases of *Southern Railway Co.* v. *Greene*, 216 U. S. 400, and *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494.

Appellants concede that under a statute imposing a tax on the franchise for the privilege of doing business, there may be included in the computation of the tax non-taxable assets such as United States securities or the income therefrom, on the authority of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, and *Educational Films Corporation* v. *Ward*, 282 U. S. 379. However, appellants submit that the Act of 1935 which allows exemptions to domestic corporations that are denied to foreign corporations creates the very essence of discrimination and denies to foreign corporations the equal protection of the laws.

The franchise tax statutes of other states and the decisions of this Court arising thereunder are not applicable or controlling in the instant cases because, under those statutes, the tax on the franchise for the privilege of doing business is imposed on both domestic and foreign corporations and, in the computation of the tax, *exemptions are not allowed to either class.*

This Court, in dismissing the issue of discrimination in the instant cases, cited as controlling the cases of *Kansas City, Memphis & Birmingham R. R.* v. *Stiles*, 242 U. S. 111, and *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132. Appellants submit that this Court erred in dismissing this issue on the authority of these cases, and that they are entitled, as a matter of justice, to have the error corrected.

These cases support the proposition that *a domiciliary state has a greater power to tax its own corporations than it has to tax foreign corporations after having been admitted to do business*—and not the converse proposition which is involved in the instant cases.

In the *Stiles* case, the Alabama statute imposed a franchise tax *upon domestic corporations based upon their whole paid-up capital stock*, and *on foreign corporations doing business in the state based on the actual amount of capital employed in the state.* In the *Northwestern Life Ins. Co.* case, the Wisconsin statute imposed an annual license fee *on domestic insurance companies based on 3% of gross income* and, *on foreign insurance companies of a similar kind, a fixed fee of $300 or such larger amount as may be imposed* under the retaliatory law. In both cases, *the domestic corporation* complained on the ground that it was denied the equal protection of the laws in favor of *foreign corporations.* This Court held not. It said in the *Stiles* case at p. 118:

> "There is no denial of equal protection of the laws (to domestic corporations) because a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants in creating them." (Words in parentheses ours.)

Similar language is found in the *Northwestern Mutual Life Insurance Co.* case at p. 139.

The error made by this Court, by the Supreme Court of Pennsylvania, and by Appellee was in assuming that this language supported the proposition that a different and greater tax could be imposed under the Act of 1935 on *foreign corporations* than on *domestic corporations.* That this is not so can be readily demonstrated.

The domiciliary state may impose on its own corporate creatures a tax on the primary franchise to be a corporation and, also, a tax on the secondary franchises to do business, but such state, in the case of foreign corporations, may impose a tax only on the privilege granted of exercising the secondary franchises within its borders.

The domiciliary state may impose a franchise tax on domestic corporations based upon *their entire authorized capital stock without apportionment,*

Kansas City, Ft. S. & M. Co. v. *Kansas,* 240 U. S. 227;
Kansas City, Memphis & Birmingham R. R. Co. v. *Stiles,* 242 U. S. 111

but such a tax imposed on foreign corporations, after having been admitted to do business, violates the due process and commerce clauses of the Federal Constitution,

Western Union Telegraph Co. v. *Kansas,* 216 U. S. 1

and, also, a franchise tax imposed on foreign corporations based upon *authorized* capital stock in the proportion represented by business transacted and property located in the state violates the due process and commerce clauses of the Federal Constitution,

Airway Corp. v. *Day,* 266 U. S. 71;
Roberts & Scheafer Co. v. *Emmerson,* 271 U. S. 50

The domicilary state may impose a tax upon *all* of the intangibles of a domestic corporation on the basis of presumption of situs at the domicile,

Cream of Wheat Co. v. *Grand Forks,* 253 U. S. 325;
Newark Fire Ins. Co. v. *State Board,* 307 U. S. 313;

but may impose tax only upon such intangibles of a foreign corporation as have acquired a business or commercial situs in the taxing state;

Wheeling Steel Corp. v. *Fox,* 298 U. S. 193.

The above cases prove beyond doubt that a state may impose a different and greater tax burden on domestic than on foreign corporations. That, however, is not the issue in the instant cases. *The question here is whether a greater comparative tax burden may be imposed on the tax base of foreign corporations than is imposed on domestic corporations.* This Court has held that to do so violates the equal protection of the laws in favor of domestic corporations in *Southern Railway Co.* v. *Greene,* 216 U. S. 400, and in *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494.

The situation in the instant cases is no different than that in the *Harding* case. There, under an Illinois statute, a foreign fire insurance company was taxed upon 100% of the full value of its net receipts whereas domestic fire insurance companies were taxed upon only 30% of the full value of personal property, net receipts having been construed as personal property. Here, the tax base of domestic corporations does *not* include investment in United States securities and shares of subsidiary companies but the tax base of appellants, foreign corporations, does include such investments.

Wherefore, it is respectfully submitted that this Court

should reconsider its order dismissing this issue in reliance on the two cases cited by it, and that it should take or note jurisdiction of these appeals in order to decide the issue of discrimination on its merits.

Impairment of the Obligation of Contract

Appellants contended that a contract between them and the Commonwealth, guaranteeing to them equality in matters of taxation with domestic corporations of the same kind, was created by the provisions of Section 1010 of the Business Corporation Law of May 5, 1933, P. L. 364, 15 Purdon's Statutes, section 2852. That section provides:

> "A foreign corporation, which shall have received a Certificate of Authority under this Act, * * *, shall be subject to the same liabilities, restrictions, duties and penalties now in force or hereafter may be imposed upon domestic corporations * * *."

Appellants further contended that the provisions of this contract were impaired by the Act of 1935 as construed when their investments in United States securities and in shares of subsidiary corporations were included in the computation of the tax on them under the Act of 1935, and their tax thereby increased by $18,972.94 (Ford Motor Company) and $4,537.61 (The Quaker Oats Company), whereas such investments were exempted from tax when owned by domestic corporations of the same kind.

In support of these contentions, appellants cited *American Smelting and Refining Co.* v. *Colorado*, 204 U. S. 103, which held that the language of a Colorado statute similar to that of Section 1010 of the Pennsylvania Business Corporation Law of 1933 created such a contract, and that the contract was impaired by a taxing statute imposing a state license tax on domestic corporations at the rate of *two*

cents upon each $1,000 of their capital stock and on foreign corporations at the rate of *four cents* upon each $1,000 of their capital stock.

This Court dismissed this issue, citing as controlling, its decision in *Phelps* v. *Board of Education,* 300 U. S. 319, 322-3, where it said:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the Act of 1909 did not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered into with employees by boards of education. Unless these views are palpably erroneous we should accept them."

It is submitted that this case should not be considered as controlling on the issue as to impairment of obligation of contract in the instant cases *because the Supreme Court of Pennsylvania assumed here that a contract existed as contended by appellants,* but held that its terms were not violated on the ground that the Act of 1935 imposed an equivalent tax burden on domestic and foreign corporations. See the opinions of that court on this issue which are attached to the Statements as to Jurisdiction (Ford Motor Company, page 50 and The Quaker Oats Company, pages 42 and 60). There the Court said:

> "An equivalent tax burden is imposed on both classes of corporations which is a sufficient compliance with the contract appellant derives from the section of the Business Corporation Law cited."

This conclusion as to the equivalency of the tax burden imposed on domestic and foreign corporations is based

upon the comparison of the amount of capital stock tax appellants *would pay if they were domestic corporations* with the amount of tax imposed on them under the Act of 1935. See opinion of the Court at page 49 of Statement as to Jurisdiction (Ford Motor Company).

Appellants have shown in their Briefs in Reply to Appellee's Motion to Dismiss or Affirm that this comparison does not prove the existence of an equivalent tax burden because it is wholly without foundation in the law *and is based upon an unconstitutional presumption.* (Ford Motor Company, pages 38 and 39; The Quaker Oats Company, pages 37, 38 and 39).

Appellants submit that the *Phelps* case, where the state courts held that the state statute did not create a contract, is not controlling in the instant cases where the Supreme Court of Pennsylvania assumed the existence of a contract under the state statute.

It is the duty of this Court in the present appeals, independently of the state court's opinions, to decide, as federal questions, the existence of any contract and the extent of its obligations;

Higginbotham v. *Baton Rouge,* 306 U. S. 535, rehearing denied in 307 U. S. 649;
Irving Trust Co. v. *Day,* 314 U. S. 556;

or in any event, to take jurisdiction of these appeals in order to review the state court's conclusion that the terms of the contract are not violated—where such conclusion, as contended by appellants, is based upon an *unconstitutional* tax comparison. See *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U. S. 77, 81.

Interstate Commerce

This issue is involved only in the appeal of The Quaker Oats Company, which will be referred to as appellant.

In the computation of tax against appellant, the Supreme Court of Pennsylvania interpreted the Act of 1935 as requiring that intrastate receipts of $171,773 and the *whole* of the interstate receipts of $7,052,574, which arose from orders solicited by appellant's two Pennsylvania sales offices but where the sales were consummated by appellant outside of Pennsylvania, be included in the numerator of the gross receipts allocation fraction.

Appellant contended that under the facts in the instant case, the Act of 1935 as so intrepreted discriminates against and unlawfully burdens interstate commerce because the interstate receipts of $7,052,574, which arose from activities and employment of capital both within and without the state, are not apportioned to the part of the interstate commerce carried on *within* the state.

This Court, in dismissing the appeal, cited as controlling this issue the case of *Western Live Stock* v. *Bureau,* 303 U. S. 250, 256, and cases there cited. Appellant submits that this case is not directly applicable because of the difference in factual situation and, further, that the cases therein cited require an apportionment of appellant's interstate receipts in the amount of $7,052,574.

In the *Western Live Stock* case, appellants published a monthly livestock trade journal which was wholly prepared, edited and published within the State of New Mexico, where their only office and place of business were located. The journal had a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation.

The New Mexico statute levied on all engaged within the

state in the business of publishing newspapers or magazines a privilege tax of 2% on the gross receipts from the sale of advertising. Appellants contended that the tax violated the Commerce Clause. This Court held not, in affirming the State court, because the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not the circulation be interstate commerce. It said at page 260:

> "The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine."

The situation is wholly different in the instant case. Sales of $7,052,574, included in the numerator of the gross receipts fraction, were made in interstate commerce. Sales activities carried on, and capital employed, in more than on state produced these sales.

The cases cited in the *Western Live Stock* case at pages 256 and 257, would, under the circumstances, require an apportionment of the interstate sales in the instant case so that only a portion and not the *whole* of the interstate sales receipts could be used in the numerator of the gross receipts fraction.

In the cases of *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, and *United States Express Co.* v. *Minnesota,* 223 U. S. 335, (cited at page 257) where gross receipts were used to measure the value of property employed within the taxing state—which appears to be the theory in the instant cases—the gross receipts were limited to intrastate receipts and to that portion of the interstate receipts which the mileage within the taxing state bore to the total mileage traveled by cars owned by these taxpayers.

In *Matson Navigation Co.* v. *State Board*, 297 U. S. 441, this Court approved the use by California of only 22.2% of interstate receipts. Under the Texas statute, no interstate receipts are used, and this was an important factor in *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 335.

If there is not made a reasonable apportionment of the interstate sales receipts in the instant cases so as to limit the amount to be used in the numerator of the gross receipts fraction to that portion of the interstate commerce within Pennsylvania, then the tax extends as stated by this Court in the *Western Live Stock* case at page 257—

> "to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every state in which the business is conducted."

Unless this apportionment is made, cumulative and multiple taxation of the interstate commerce results because Illinois and Ohio use the same sales in the computation of their franchise taxes imposed on appellant.

> *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290;
> *Aluminum Co. of America* v. *Evatt*, 140 Ohio St., 385, 45 N. E. (2d) 118.

Conclusion

Because the cases cited by this Court in its orders granting the motion to dismiss and in dismissing the two appeals are not directly applicable to, or controlling of, the issues raised in the appeals, appellants respectfully request this Court to reconsider the Motion to Dismiss or Affirm in each case, and to note jurisdiction of the appeals.

We, the undersigned, certify that the within Petition for Rehearing is presented in good faith and not for delay.

W. A. SEIFERT,
GEO. ROSS HULL,
ROY J. KEEFER,
Counsel for Appellants.

March 28, 1945.

No. 873. QUAKER OATS CO. *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. March 12, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165; *Educational Films Corp.* v. *Ward*, 282 U. S. 379; *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331; *Butler Bros.* v. *McColgan*, 315 U. S. 501; (2) *Kansas City, M. & B. R. Co.* v. *Stiles*, 242 U. S. 111; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132; (3) *Phelps* v. *Board of Education*, 300 U. S. 319, 322–323; (4) *Western Live*

Stock v. *Bureau*, 303 U. S. 250, 256, and cases cited. *Messrs. W. A. Seifert, Geo. Ross Hull* and *Roy J. Keefer* for appellant. *James H. Duff*, Attorney General, and *Mr. H. F. Stambaugh* for appellee. Reported below: 350 Pa. 253, 38 A. 2d 325.